10

No. 05-7058

Filed
Oct 13 2005

IN THE

Supreme Court of the United States

Lorenzo L. Jones,

Petitioner,

v.

Barbara Bock et al.,

Respondents.

ORIGINAL

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Jean-Claude André
(Counsel of Record)
IVEY, SMITH & RAMIREZ
2602 Cardiff Ave.
Los Angeles, CA 90034
(310) 558-0932

October 13, 2005

QUESTIONS PRESENTED

42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. 104-134, 110 Stat. 1321 (1996), provides that "[n]o action shall be brought with respect to prison conditions" under 42 U.S.C. § 1983 or other federal law "until such administrative remedies as are available are exhausted." "[E]xhaustion in cases covered by § 1997e(a) is * * * mandatory." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The questions presented, over both of which the circuits are intractably split, are:

1. Whether satisfaction of the PLRA's exhaustion requirement is a prerequisite to a prisoner's federal civil rights suit such that the prisoner must allege in his complaint how he exhausted his administrative remedies (or attach proof of exhaustion to the complaint), or instead, whether non-exhaustion is an affirmative defense that must be pleaded and proven by the defense.

2. Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, Valerie A. Chaplin, Paul Morrison, Michael Opanasenko, Janet Konkle, and Ahmad Aldabagh were defendants below and are respondents here.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISION 1

STATEMENT 2

A. Statutory Background 2

B. The Sixth Circuit's Heightened Pleading Requirements for PLRA Plaintiffs 3

C. Factual and Procedural Background 4

REASONS FOR GRANTING THE WRIT 10

A. The Federal Courts of Appeals Are Irreconcilably Split Over Whether Non-Exhaustion Is an Affirmative Defense To Be Raised Defendants or Whether Proof of Exhaustion Is a Prerequisite to Suit that Must Be Established by a PLRA Plaintiff's Complaint 11

B. The Federal Courts of Appeals Are Irreconcilably Split Over Whether the PLRA Prescribes a "Total Exhaustion" Rule that Requires Federal Courts to Dismiss a PLRA Plaintiff's Complaint for Failure to Exhaust Administrative Remedies Whenever There Is a Single Unexhausted Claim, Despite the Presence of Other Exhausted Claims 18

CONCLUSION 25

TABLE OF CONTENTS-Continued

Appendix

Appendix A
Sixth Circuit Opinion (Unpublished),
June 15, 2005 ..... App. 1a

Appendix B
District Court Order
Adopting Report and Recommendation, in Part (Unpublished)
September 25, 2003 ..... App. 4a

Appendix C
Magistrate Judge's Report and Recommendation (Unpublished)
July 30, 2003 ..... App. 7a

Appendix D
Defendants Bock's, Chaplin's, Morrison's, and Opanasenko's
Rule 12(b) Motion to Dismiss for Failure to Comply with the
Exhaustion Requirement of the PLRA ..... App. 26a

Appendix E
Plaintiff Supplemental Response to Defendant's Motion to Dismiss ..... App. 36a

TABLE OF AUTHORITIES

CASES:

Anderson v. XYZ Corr. Health Servs., Inc., 407 F.3d 674 (CA4 2005) 13, 14, 16

Baxter v. Rose, 305 F.3d 486 (CA6 2002) 4,7-9, 11

Blackmon v. Crawford, 305 F. Supp. 2d 1174 (D. Nev. 2004) 23

Boyd v. Pugh, No. Civ. 3:CV-04-1761, 2005 WL 1430087 (M.D. Pa. June 17, 2005). 19

Boyd v. Corrections Corp. of Am., 380 F.3d 989 (CA6 2004), *cert. denied sub nom. Allen v. Corrections Corp. of Am.*, 125 S.Ct. 1639 (2005) 17

Brown v. Toombs, 139 F.3d 1102 (CA6), *cert. denied*, 525 U.S. 833 (1998) 3-4, 11, 13

Casanova v. Dubois, 304 F.3d 75 (CA1 2002) 13

Clark v. Mason, No. C04-1647C, 2005 WL 1189577 (W.D. Wash. May 19, 2005). 23

Cooper v. Garcia, 55 F. Supp. 2d 1090 (S.D. Cal. 1999) 23

Cummings v. Rubenstein, No. Civ. A. 5:03-2195, 2004 WL 3312062 (S.D.W. Va. Sep. 30, 2004) 23

Dixon v. Page, 291 F.3d 485, 489-90 (CA7 2002) 22

Donovan v. Magnusson, No. Civ. 03-226-B-W, 2004 WL 1572598 (D. Me. June 7, 2004) ... 22

Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134 (CA10 2005) 12

Foulk v. Charrier, 262 F.3d 687 (CA8 2001) 13

Graves v. Norris, 218 F.3d 884 (CA8 2000) 20

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 21

Hemphill v. New York, 380 F.3d 680 (CA2 2004) 13

Henderson v. Sebastian, No. 04-C-0039-C, 2004 WL 1946398 (W.D. Wis. Aug. 25, 2004) .. 22

Jackson v. District of Columbia, 254 F.3d 262 (CADC 2001) 14

Jenkins v. Haubert, 179 F.3d 19 (CA2 1999) 13

Johnson v. Johnson, 385 F.3d 503 (CA5 2004) 11, 22

Johnson v. Testman, 380 F.3d 691 (CA2 2004) 13

Johnson v. True, 125 F. Supp. 2d 186 (W.D. Va. 2000) 22

Jones v. Bock, 135 Fed. Appx. 837 (CA6 2005) ..... *passim*

Jones Bey v. Johnson, 407 F.3d 801 (CA6 2005) 4, 9, 19-20

Knuckles-El v. Toombs, 215 F.3d 640 (CA6), *cert. denied*, 531 U.S. 1040 (2000) .. 4, 7, 11, 13

Kozohorsky v. Harman, 332 F.3d 1141 (CA8 2003) 20

Lewis v. Washington, 300 F.3d 829 (CA7 2003) 22

Lozeau v. Lake County, Montana, 98 F. Supp. 2d 1157 (D. Mont. 2000) 23

Massey v. Helman, 196 F.3d 727 (CA7 2000), *cert. denied*, 532 U.S. 1065 (2001) 13

McCarthy v. Madigan, 503 U.S. 140 (1992). 3

Ornelas v. Giurbino, 358 F. Supp. 2d 955 (S.D. Cal. 2005) 8

Ortiz v. McBride, 380 F.3d 649 (CA2 2004), *cert. denied*, 125 S.Ct. 1398 (2005) 21-22

Porter v. Nussle, 534 U.S. 516 (2002) 2-3

Ramirez v. Bray, No. C 04-3769 MMC (PR), 2005 WL 2249900 (N.D. Cal. Sep. 15, 2005) .. 23

Randolph v. Rodgers, 253 F.3d 342 (CA8 2001) 13

Ray v. Kertes, 285 F.3d 287 (CA3 2002) 13, 14

Rivera v. Allin, 144 F.3d 719 (CA 11), *cert. dismissed*, 524 U.S. 978 (1998) 12

Rivera v. Whitman, 161 F. Supp. 2d 337 (D.N.J. 2001) 19

Ross v. City of Bernalillo, 365 F.3d 1181 (CA10 2004) 12, 19-20

Singleton v. Morales, No. CV F 035557RECLJOP, 2005 WL 2064145
(E.D. Cal. Aug. 25, 2005) 23

Smith v. Mensinger, 293 F.3d 641 (CA3 2002) 13

Smith v. Villanueva, No. CV04-1211-MO, 2005 WL 2105013 (D. Or. Aug. 22, 2005) 23

Steele v. Federal Bureau of Prisons, 355 F.3d 1204 (CA10 2003),
cert. denied, 125 S.Ct. 344 (2004) 12-13, 16, 17

Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002) 4, 14

Thorp v. Kepoo, 100 F. Supp. 2d 1258, 1263 (D. Haw. 2000) 23

Vazquez v. Ragonese, No. 05-1203, 2005 WL 1842273 (CA3 Aug. 4, 2005) 19

Virginia Military Inst. v. United States, 508 U.S. 946 (1993)
(opinion of Scalia, J., respecting denial of certiorari) 21

Wendell v. Asher, 162 F.3d 887 (CA5 1998) .....

Wyatt v. Terhune, 315 F.3d 1108 (CA9), *cert. denied sub nom.*
Alameida v. Wyatt, 540 U.S. 810 (2003) 13, 16, 17

STATUTES:

Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 352 (1980) 3

42 U.S.C. § 1997e (1994) 3

Prison Litigation Reform Act of 1995, Pub. L. 104-134, 110 Stat. 1321 (1996) ..... *passim*

42 U.S.C. § 1997e(a) (2004) ..... *passim*

42 U.S.C. § 1997e(c) (2004) 14, 19

42 U.S.C. § 1983 ..... *passim*

MISCELLANEOUS:

Administrative Office of the U.S. Courts, Judicial Facts and Figures: Multi-year
Statistical Compilations of Federal Court Caseload Through Fiscal Year 2004 (2005),
avialable at http://www.uscourts.gov/judicialfactsfigures/alljfftables.pdf 10

Brief for the Respondent in Opposition, *Alameida v. Wyatt*, No. 03-10625 16

Brief for the Respondent in Opposition, *Allen v. Corr. Corp. of Am.*, No.04-784 17

Brief for the Respondent in Opposition, *McBride v. Ortiz*, No. 04-668 21

Brief for the United States in Opposition,
Steele v. Federal Bureau of Prisons, No. 03-10625 17

Brief of the States of California et al. as *Amici Curiae*, *McBride v. Ortiz*, No. 04-668 .... 18, 21

Michigan Department of Corrections Policy Directive No. 03.02.130 (October 11, 1999) 5

Petition for Certiorari, *Alameida v. Wyatt*, No. 03-10625 16

Petition for Certiorari, *McBride v. Ortiz*, No. 04-668 21

John Scalia, U.S. Dep't of Justice, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980-2000 (rev'd ed. 2002), http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf 10

Robert L. Stern et al., SUPREME COURT PRACTICE (8th ed. 2002) 21

5 Charles Alan Wright & Arthur R. Miller,
FEDERAL PRACTICE AND PROCEDURE (Supp. 2001) 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner Lorenzo L. Jones respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-3a) is unreported but is *available at* 135 Fed. Appx. 837. The order of the district court (Pet. App. 4a-6a) and the report and recommendation of the magistrate judge (Pet. App. 7a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2005. Justice Stevens extended the time for Petitioner to file this petition to and including October 13, 2005. App. No. 05A210. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 1997e(a) of the Prison Litigation Reform Act of 1995, Pub. L. 104-134, 110 Stat. 1321 (1996), provides:

> Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

STATEMENT

This case presents two important and recurring questions over which the courts of appeals are avowedly split regarding application how federal courts should apply the exhaustion requirement of the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996), at the pleading stage.

The first question presented – whether satisfaction of the PLRA's exhaustion requirement is a prerequisite to a prisoner's federal civil rights suit such that the prisoner must allege in his complaint how he exhausted his administrative remedies (or attach proof of exhaustion to the complaint), or instead, whether non-exhaustion is an affirmative defense that must be pleaded and proven by the defense – has resulted in a 3-7 division among the ten federal courts of appeals that have addressed the issue.

The second question presented – whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims – has resulted in a 3-1-3 division among the seven federal courts of appeals that have addressed the issue.

Because these circuit splits will not go away absent this Court's intervention, because these issues affect thousands of prisoner civil rights suits each year, and because the Sixth Circuit's decision in this case is plainly wrong, review by this Court is warranted.

A. Statutory Background

Prior to 1996, the requirement that a prisoner exhaust administrative remedies before commencing an action under 42 U.S.C. § 1983, was "in large part discretionary." *Porter v.*

Nussle, 534 U.S. 516, 523 (2002). The then-governing statute authorized a district court, if it "believe[d] that such a requirement would be appropriate and in the interests of justice," to stay the prisoner's action for a period not to exceed 180 days while the prisoner exhausted administrative remedies. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 352 (1980), *as amended*, 42 U.S.C. § 1997e (1994). This Court described this provision as a "limited exhaustion requirement." *McCarthy v. Madigan*, 503 U.S. 140, 150-51 (1992).

In the PLRA, Congress amended the exhaustion prescription. 42 U.S.C. § 1997e(a) now provides that "[n]o action shall be brought with respect to prison conditions"[1] under 42 U.S.C. § 1983 or other federal law "until such administrative remedies as are available are exhausted." Thus, "exhaustion in cases covered by § 1997e(a) is now mandatory." *Porter*, 534 U.S. at 524.

B. The Sixth Circuit's Heightened Pleading Requirements for PLRA Plaintiffs

Shortly after Congress amended PLRA §1997e, the Sixth Circuit began to read the PLRA's mandatory exhaustion prescription as requiring heightened pleading standards for PLRA plaintiffs. Because the opinions below applied these heightened standards to dismiss petitioner's complaint, we provide a brief discussion of their genesis here.

Relevant to the first question presented, in *Brown v. Toombs*, 139 F.3d 1102 (CA6), *cert. denied*, 525 U.S. 833 (1998), the Sixth Circuit held "that prisoners filing § 1983 cases involving prison conditions must allege and show that they have exhausted all available state administrative remedies. A prisoner should attach to his § 1983 complaint the administrative decision, if it is available, showing the administrative disposition of his complaint." *Id.* at 1104.

---

[1] "Prison conditions" suits comprise "all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter*, 534 U.S. at 532.

Brown further admonished district courts within the Sixth Circuit to "enforce th[is] exhaustion requirement *sua sponte* if not raised by the defendant." *Id.* In *Knuckles-El v. Toombs*, 215 F.3d 640 (CA6), *cert. denied*, 531 U.S. 1040 (2000), the Sixth Circuit reiterated that, if written documentation of exhaustion is unavailable to a PLRA plaintiff at the time they file their complaint, they must "describe with specificity the administrative proceeding and its outcome" to avoid dismissal under *Brown*. *Id.* at 642. In *Baxter v. Rose*, 305 F.3d 486 (CA6 2002), the Sixth Circuit clarified "that a [PLRA] plaintiff, who fails to make a sufficient allegation of exhaustion in their initial complaint [as required by *Brown* and *Knuckles-El*,] not be allowed to amend his complaint to cure the defect." *Id.* at 489. As discussed *infra*, these heightened pleading requirements have been embraced by two additional circuits but rejected by seven others.

Relevant to the second question presented, in *Jones Bey v. Johnson*, 407 F.3d 801 (CA6 2005), the Sixth Circuit held that "the PLRA's exhaustion requirement applies such that a 'mixed' complaint, alleging both exhausted and unexhausted claims, must be completely dismissed for failure to exhaust administrative remedies." *Id.* at 805; *see also id.* at 806 ("We now * * * hold[] that total exhaustion is required under the PLRA."). As discussed *infra*, the total exhaustion rule adopted by *Jones Bey* is consistent with the rules or practices in two circuits but inconsistent with the rules or practices in four others.

C. Factual and Procedural Background[2]

1. On November 14, 2000, petitioner was in a motor vehicle accident while he was in the custody of the Michigan Department of Corrections ("MDOC"). *See* Pet. App. 1a. As a

---

[2] The facts as stated in this petition are taken from the decisions below, which in turn were taken from the allegations in petitioner's complaint, all of which are assumed true on appeal from a motion to dismiss. *See Swierkiewicz v. Sorema, N. A.*, 534 U.S. 506, 508 n.1 (2002).

result of the accident, petitioner suffered a handful of serious injuries, including a cervical spine fracture and dislocation with injury to the spinal cord, which required fusion surgery; a broken arm; lower back injuries; upper and lower extremity weakness on his left side; and numbness below his neck. *See id.* at 8a. Approximately seven months after the accident – but while petitioner was still wearing neck and leg braces, utilizing a walking cane, and medicated with a muscle relaxant – respondent Morrison assigned petitioner to work as a "Big Yard Equipment Handler" at his institution. *See id.* This position required petitioner to lift items, stand, bend, stoop, and distribute athletic equipment to other inmates. *See id.* Petitioner notified Morrison and the officer to whom petitioner was ordered to report, respondent Opanasenko, of his injuries, but his assignment was not changed. *See id.* Reluctantly, petitioner reported to his work assignment but aggravated his injuries while attempting to complete his duties. *See id.* at 8a-9a. Opanasenko accused petitioner of faking his injuries; threatened petitioner with discipline if he did not perform his duties satisfactorily; repeatedly harassed petitioner; and in retaliation for complaining about his injuries, issued petitioner a negative work evaluation. *See id.*

2. On September 15, 2001, petitioner filed a grievance[3] against Morrison, Opanasenko, and four other MDOC employees – (1) respondent Bock, the institution's warden; (2) respondent Chaplin, the institution's deputy warden in charge of approving work

---

[3] A Michigan prisoner's administrative remedies are set forth at Michigan Department of Corrections Policy Directive ("MDOC PD") No. 03.02.130 (October 11, 1999), which provides for a three-level written grievance procedure to be used after a prisoner attempts to verbally resolve an issue. At Step I, the prisoner files a written grievance with the Step I grievance coordinator, who assigns someone to respond. *See* MDOC PD No. 03.02.130(T). If the prisoner does not receive a timely response or is dissatisfied with the response at Step I, the prisoner may file a Step II appeal with the Step II grievance coordinator. *See id.* Likewise, if the prisoner does not receive a timely Step II response or is dissatisfied with the response, the inmate may file a Step III appeal with MDOC's Prisoner Affairs Section. *See id.*

assignments; (3) respondent Konkle, one of the institution's registered nurses; and (4) respondent Aldabaugh, one of the institution's physicians – all of whom petitioner alleged were deliberately indifferent to his medical needs by allowing petitioner's work assignment. *See id.* at 42a-43a. Petitioner also alleged that Opanasenko harassed and retaliated against petitioner for complaining about his injuries. *See id.* Petitioner's two-page typewritten grievance described the underlying incidents and referred to respondents either by name or, where their name was unknown to petitioner, by title. *See id.* Petitioner received an undated denial of his grievance. *See id.* at 44a. On October 11, 2001, petitioner appealed his grievance to Step II, *see id.* at 46a, and received from respondent Bock on October 30, 2001, a response "partially resolv[ing]" the grievance, *see id.* at 47a. Dissatisfied with Bock's "partial[] resol[ution]" at Step II, petitioner appealed his grievance to Step III on November 3, 2001. *See id.* at 48a-49a. On December 11, 2001, the MDOC issued its response, affirming the responses at Steps I and II. *See id.* at 50a.

3. Dissatisfied with the resolution of his grievance, on November 15, 2002, proceeding *pro se*, petitioner filed a 42 U.S.C. § 1983 federal civil rights complaint in the United States District Court for the Eastern District of Michigan. *See id.* at 7a. Petitioner's complaint named all six respondents,[4] the State of Michigan, and the MDOC as defendants and alleged violations of his First, Eighth, and Fourteenth Amendment rights.[5] *See id.* at 1a, 7a. Specifically, petitioner alleged that all six respondents were deliberately indifferent to his medical needs in

---

[4] In his complaint, petitioner named respondents Konkle and Aldabaugh as Doe defendants. *See* Pet. App. 9a n.2. Subsequently, petitioner moved to substitute Konkle and Aldabaugh for the Doe defendants, and on January 17, 2003, the district court granted petitioner's motion. *See id.*

[5] On November 19, 2002, the district court dismissed the State of Michigan and the MDOC because they were entitled to Eleventh Amendment immunity. *See* Pet. App. 9a. Petitioner does not challenge this ruling.

violation of the Eighth and Fourteenth Amendments; that the Opanasenko and Chaplin also violated his First Amendment rights by retaliating against him for complaining about his injuries; and that the MDOC and State of Michigan were liable under a respondeat superior theory of liability. *See id.* at 9a. Petitioner's complaint stated that he exhausted all administrative remedies available to him and provided the dates on which he filed his Step I grievance and his Step II and Step III appeals and the dates on which he received the institution's responses at each step. *See id.* at 1a, 5a. Petitioner did not attach copies of any of the documents from his grievance and appeals and did not describe the remedies he pursued or the outcome of the administrative proceedings. *See id.* at 1a-2a, 5a, 16a.

4. On February 13, 2003, respondents moved to dismiss petitioner's complaint. *See id.* at 26a-35a. Respondents conceded that petitioner exhausted his First Amendment retaliation claim against Opanasenko. *See id.* at 32a. Notwithstanding this concession, respondents argued that the entirety of petitioner's complaint should be dismissed because petitioner neither attached to his complaint copies of his grievance, his appeal forms, and the MDOC's responses, nor, in the absence of providing proof of exhaustion, described with sufficient particularity how he exhausted his administrative remedies as required by the Sixth Circuit in *Knuckles-El* and *Baxter*. *See id.* at 9a, 30a-31a. Respondents attached to their motion copies of petitioner's grievance, his appeal forms, and the MDOC's responses. *See id.* at 16a-17a. On February 21, 2003, petitioner opposed respondents' motion and attached to his opposition the proof of exhaustion that he had failed to attach to his complaint but that respondents had provided with their motion. *See id.* at 16a, 36a-51a. On March 18, 2003, the district court referred respondents' motion to a magistrate judge for a report and recommendation. *See id.* at 20a.

5. The magistrate judge recommended that petitioner's claims against Bock, Chaplin, Konkle, and Aldabaugh be dismissed for failure to state a claim because petitioner failed to assert that any of them knew or should have known that petitioner's work assignment would place him at a serious risk of harm. *See id.* at 14a; *see also id.* at 4a. In contrast, the magistrate judge recommended that petitioner's claims against Morrison and Opanasenko should not be dismissed because petitioner stated claims against them and exhausted his administrative remedies as to those claims. *See id.* at 20a-24a; *see also id.* at 4a.

The magistrate rejected respondents' argument that the entirety of petitioner's complaint should be dismissed because petitioner failed to attach to his complaint proof of exhaustion or describe with particularity in his complaint how he exhausted his claims. *See id.* at 20a. The magistrate noted that the Sixth Circuit's heightened pleading requirements for PLRA plaintiffs were designed to help district courts determine expeditiously whether PLRA plaintiffs exhausted their claims. *See id.* at 19a. Nevertheless, the magistrate found the heightened pleading requirements inapplicable to this case. *See id.* at 19a-20a. According to the magistrate, *who* provided proof of exhaustion and *how* it was provided were irrelevant because it was present in the record by the time the case was referred to him for evaluation and because the court's ability to evaluate the case expeditiously was unaffected. *See id.* at 20a. In essence, the magistrate found that, by providing proof of exhaustion with their motion to dismiss, respondents cured -- or rendered harmless – petitioner's pleading error. *See id.*

Accordingly, the magistrate found *Baxter* inapposite. *See id.* at 18a-19a. Petitioner and both Morrison and Opanasenko filed objections to the magistrate's report and recommendation. *See id.* at 4a.

6. Reviewing the magistrate's report and recommendation *de novo*, the district court dismissed petitioner's complaint in its entirety. The district court adopted the magistrate's recommendation that petitioner's claims against Bock, Chaplin, Konkle, and Aldabaugh should be dismissed but overruled his recommendation that petitioner's claims against Morrison and Opanasenko should go forward. *See id.* at 5a. Unlike the magistrate, the district court relied on *Baxter* and found that "the documentation regarding grievances supplied by [respondents] as part of their motion to dismiss does not cure [petitioner's] failure to properly plead exhaustion." *Id.* at 6a. The district court also found that petitioner's attachment of proof of exhaustion to his opposition did not cure his pleading failure. *See id.* at 5a-6a. In particular, the district court construed petitioner's late provision of proof of exhaustion as an attempt to amend his complaint and, relying on *Baxter*, held that Sixth Circuit law prohibited PLRA plaintiffs from doing so. *See id.* at 6a. Petitioner appealed.

7. The Sixth Circuit affirmed, finding that the district court's dismissal of petitioner's complaint was proper for two reasons. First, rather than consider petitioner's challenge to the district court's dismissal of his claims against Bock, Chaplin, Konkle, and Aldabaugh for failure to state a claim, the Sixth Circuit held that petitioner's failure to comply with its heightened pleading requirement for PLRA plaintiffs was fatal to his *entire* complaint. *See id.* at 3a. Like the district court, the Sixth Circuit also held that *Baxter* precluded petitioner from offering proof of exhaustion by attaching it to his opposition to respondents' motion to dismiss. *See id.* at 2a-3a. Relying on *Jones Bey*, the Sixth Circuit held alternatively that, "even if Jones had shown he had exhausted some of his claims, the district court properly dismissed the complaint because Jones did not show that he had exhausted all of his claims." *See id.* at 3a.

8. This petition followed.

REASONS FOR GRANTING THE WRIT

In 2004 nationwide, prisoners brought 23,449 prison-condition and civil rights suits against state and federal correctional officials.[6] Administrative Office of the U.S. Courts, Judicial Facts and Figures: Multi-year Statistical Compilations of Federal Court Caseload Through Fiscal Year 2004, tbl. 2.2 (2005), http://www.uscourts.gov/judicialfactsfigures/alljfftables.pdf. These filings comprised over 8% of the civil cases filed, outnumbering every other category including habeas filings, *compare id. with id.* tbl. 2.1, and over 6.5% of all cases filed (civil and criminal) in the nation's district courts in 2004, *compare id.* tbl. 2.2 *with id.* tbl. 4.1.

The first question presented involves an issue relevant to every one of the over 20,000 PLRA complaints filed each year because the issue affects how every PLRA plaintiff in the country must plead their prison condition claims. Although we know of no statistics indicating the number of PLRA suits involving the second question presented, the number is, likewise, clearly immense and affects every PLRA plaintiff who brings properly exhausted claims, yet unwittingly – and likely due to their *pro se* status, lack of legal training, and lack of access to the most current legal materials – adds unexhausted claims to their complaint. Thus, each Term that this Court waits to resolve the issues presented in this petition, hundreds – if not, thousands – of PLRA plaintiffs bringing properly exhausted prison condition claims will lose their opportunity to test the merits of their claims in federal court. Because of these staggering numbers, this

---

[6] Historical caseload profiles are *available at* http://www.uscourts.gov and in John Scalia, U.S. Dep't of Justice, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980-2000 (rev'd ed. 2002), http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf.

Court's prompt articulation of national PLRA pleading standards is required.

A. The Federal Courts of Appeals Are Irreconcilably Split Over Whether Non-Exhaustion Is an Affirmative Defense To Be Raised Defendants or Whether Proof of Exhaustion Is a Prerequisite to Suit that Must Be Established by a PLRA Plaintiff's Complaint

There can be no doubt that the federal courts of appeals are deeply and avowedly split on the first question presented by this petition and that this circuit split merits resolution. The ten federal courts of appeals that have resolved the issue fall into two distinct camps, creating a 3-7 split that requires this Court's intervention.

Three courts – the Sixth, Tenth, and Eleventh Circuits – have held that exhaustion is a prerequisite to suit that PLRA plaintiffs must allege in their complaints to avoid dismissal.[7] As already outlined *supra*, the "heightened pleading standard," *Baxter*, 305 F.3d at 489, applied by the Sixth Circuit in this case requires "that prisoners filing § 1983 cases involving prison conditions must allege and show that they have exhausted all available state administrative remedies. A prisoner should attach to his § 1983 complaint the administrative decision, if it is available, showing the administrative disposition of his complaint," *Brown*, 139 F.3d at 1104; *see also Knuckles-El*, 215 F.3d at 642 ("[A] prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome."). Shortly after the Sixth Circuit decided *Brown*, the

---

[7] The Fifth Circuit has suggested but not conclusively held that exhaustion must be pleaded by PLRA plaintiffs to avoid dismissal. *See Johnson v. Johnson*, 385 F.3d 503, 516 n.7 (CA5 2004) (noting that some of the court's prior decisions "imply or assume that exhaustion is a component of the plaintiff's claim, not an affirmative defense that must be raised and proved by the defendants"); *but cf. Wendell v. Asher*, 162 F.3d 887, 890 (CA5 1998) (holding that PLRA exhaustion "imposes a requirement, rather like a statute of limitations, that may be subject to certain defenses such as waiver, estoppel, or equitable tolling.").

Eleventh Circuit rendered a nearly identical holding in *Rivera v. Allin*, 144 F.3d 719 (CA 11), *cert. dismissed*, 524 U.S. 978 (1998). In *Rivera*, the Eleventh Circuit reviewed the district court's dismissal of the plaintiff's complaint for failure to assert "any allegations of exhaustion of remedies." *Id.* at 731. Finding no fault with the district court's dismissal, the Eleventh Circuit held that "[a] claim that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted," thereby rendering exhaustion a prerequisite to suit that PLRA plaintiffs must allege in their complaints. *Id.* Finally, in *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204 (CA10 2003), *cert. denied*, 125 S.Ct. 344 (2004), the Tenth Circuit followed the First Circuit's decision in *Rivera* and the Sixth Circuit's decision in *Knuckles-El*, rejected "exhaustion as an affirmative defense," and adopted the Sixth Circuit's heightened pleading requirement for PLRA plaintiffs.[8] *Id.* at 1210 (citations omitted).

These courts have reasoned, in essence, that because exhaustion is mandatory under the PLRA, it must be a pleading requirement. For example, in *Steele*, the Tenth Circuit reasoned that its

> conclusion is compelled by the Supreme Court's emphasis [in *Porter*] on the mandatory nature of exhaustion, implications of the PLRA statutory scheme, the structure of the Rules of Civil Procedure and our own precedent. We decline to characterize exhaustion as an affirmative defense because it cannot be waived. "Under Federal Rule of Civil Procedure 8(c), a failure to plead an affirmative defense results in a waiver of that defense."
>
> * * * *
>
> [C]lassification of the PLRA's exhaustion requirement as an affirmative defense means that defendants may choose to ignore it for their own strategic reasons. This court, however, has warned against "trivializing the Supreme Court's holding

---

[8] As we discuss *infra*, *Steele*'s adoption of the Sixth Circuit's heightened pleading standard was likely *dicta*. Since then, however, the Tenth Circuit has resolved any doubts over whether it is law of the circuit. *See, e.g., Fitzgerald v. Corr. Corp. of Am.*, 403 F.3d 1134, 1139 (CA10 2005) (applying *Steele*); *Ross v. City of Bernalillo*, 365 F.3d 1181, 1184-85 (CA10 2004) (same).

* * * that exhaustion is now mandatory."

Steele, 355 F.3d at 1209 (citations omitted). The Sixth Circuit's analysis of the issue was significantly more abbreviated, yet concerns similar to those articulated by the Tenth Circuit appear to have guided its holdings. *See Brown*, 139 F.3d at 1104 ("In light of the plain mandatory language of the statute regarding exhaustion of remedies, the legislative purpose underlying the plain language, and the sound policy on which it is based, this court will henceforth require that prisoners filing § 1983 cases involving prison conditions must allege and show that they have exhausted all available state administrative remedies."); *see also Knuckles-El*, 215 F.3d at 642 (explaining that the rule announced in *Brown* was necessary because the PLRA provides that "no action shall be brought until all available administrative remedies are exhausted" and requiring plaintiff to allege exhaustion permits the district court to "intelligently decide if the issues raised can be decided on the merits").

In contrast, seven courts – the First, Second, Third, Fourth, Seventh, Eighth, and Ninth Circuits – have held that a PLRA plaintiff's alleged failure to exhaust his administrative remedies is an affirmative defense to be raised by defendants.[9] *See Casanova v. Dubois*, 304 F.3d 75, 77 (CA1 2002); *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (CA2 1999);[10] *Ray v. Kertes*, 285 F.3d 287, 295 (CA3 2002); *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 681 (CA4 2005);

---

[9] Many of these courts have also held that, as an affirmative defense, non-exhaustion is waivable if not timely raised. *See, e.g., Johnson v. Testman*, 380 F.3d 691, 695-96 (CA2 2004) (finding waiver); *Smith v. Mensinger*, 293 F.3d 641, 647 n.3 (CA3 2002) (same); *Randolph v. Rodgers*, 253 F.3d 342, 348 n.11 (CA8 2001) (same).

[10] *Jenkins*' statement that non-exhaustion is an affirmative defense appears to be *dicta*. Since *Jenkins* was decided, however, the Second Circuit has repeatedly referred to non-exhaustion as an affirmative defense. *See, e.g., Testman*, 380 F.3d at 695 (following *Jenkins*); *Hemphill v. New York*, 380 F.3d 680, 686 (CA2 2004) (same). Accordingly, the Second Circuit is unquestionably in accord with the majority rule.

Massey v. Helman, 196 F.3d 727, 735 (CA7 2000), *cert. denied*, 532 U.S. 1065 (2001); *Foulk v.Charrier*, 262 F.3d 687, 697 (CA8 2001); *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (CA9), *cert. denied sub nom. Alameida v. Wyatt*, 540 U.S. 810 (2003).[11]

Some of these courts have reasoned that, because Congress drafted the PLRA's exhaustion requirement, 42 U.S.C. § 1997e(a), in the same statutory section as – indeed, just a few printed lines before – the subsection listing grounds on which a district court may *sua sponte* dismiss a prisoner's action, *id.* at § 1997e(c)(1), but *did not* include failure to exhaust among those grounds, Congress did not intend to impose a heightened pleading requirement on PLRA plaintiffs. *See, e.g., Anderson*, 407 F.3d at 680; *Ray*, 285 F.3d at 296 n.10. These courts have also found that Congress' decision to allow district courts to dismiss *sua sponte* a prisoner's complaint "without first requiring the exhaustion of administrative remedies" further supports this interpretation of Congress' intent. *E.g., Anderson*, 407 F.3d at 680-81; *see also, e.g., Ray*, 285 F.3d at 296 n.9. Others have looked to the pleading requirements specified by the Federal Rules of Civil Procedure and this Court's discussions of them. According to these courts, "'Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions,'" *e.g., Wyatt*, 315 F.3d at 1118 (quoting *Swierkiewicz*, 534 U.S. at 513), one of which exhaustion under the PLRA is not, *see, e.g., id.* at 1118-19; *Ray*, 285 F.3d at 297. And yet others have resorted to "considerations of policy [and] fairness," inasmuch as "it is considerably easier for a prison administrator to show failure to exhaust than it is for a prisoner to demonstrate exhaustion." *E.g., Ray*, 285 F.3d at 295 (quoting 5 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1271, at 444 (Supp. 2001)).

---

[11] The D.C. Circuit has suggested but not directly held that non-exhaustion is an affirmative defense. *See Jackson v. District of Columbia*, 254 F.2d 262, 267 (CADC 2001).

As the preceding discussion shows, there can be no doubt that the federal courts of appeals are irreconcilably split over whether satisfaction of the PLRA's exhaustion requirement is a prerequisite to a prisoner's lawsuit such that the prisoner must allege in his complaint how he exhausted his administrative remedies (or attach proof of exhaustion to the complaint), or instead, whether non-exhaustion is an affirmative defense that must be pleaded and proven by the defense. Only this Court can resolve this entrenched circuit split.

Moreover, this case presents an ideal vehicle for deciding this important and divisive question because the issue was conclusively and dispositively applied by the Sixth Circuit in its decision below and because the split among the circuits has widened since this Court was last presented with a viable vehicle for deciding the issue.

There is no doubt that, had petitioner's case been adjudicated in the circuits embracing non-exhaustion as an affirmative defense, three of petitioner's claims would have been allowed to go forward. In these circuits, respondents would not have been able to plead non-exhaustion as a defense to the entirety of petitioner's complaint because, as respondents conceded in the district court, petitioner exhausted at least one of his claims – his First Amendment retaliation claim against Opanesenko. *See* Pet. App. 32a. Accordingly, respondents would have been limited to pleading non-exhaustion as an affirmative defense to only petitioner's six deliberate indifference claims. Crucially, however, none of the courts below found that these six claims were unexhausted.[12] Rather, the district court dismissed petitioner's deliberate indifference

---

[12] For this reason, in the absence of a heightened pleading requirement, the "total exhaustion" rule applied by the Sixth Circuit below as an alternative justification for affirming the district court's dismissal of petitioner's complaint would be inapplicable. That is, the "total exhaustion" rule applied by the Sixth Circuit was only a viable alternative justification for

(continued...)

claims against Bock, Chaplin, Konkle, and Aldabaugh on the merits without inquiring whether the claims were exhausted, *see id.* at 14a, and the district court dismissed petitioner's deliberate indifference claims against Morrison and Opanasenko, notwithstanding the magistrate's finding that the claims were exhausted, *see id.* at 20a-24a, because of petitioner's failure to comply with the Sixth Circuit's heightened pleading standard, *see id.* at 5a-6a. Thus, in any of the seven circuits embracing non-exhaustion as an affirmative defense, three of petitioner's claims – his retaliation claim against Opanasenko and his deliberate indifference claims against Opanasenko and Morrison – would have been allowed to go forward.

To our knowledge, in the past five years, three petitions have attempted to raise the issue whether non-exhaustion is an affirmative defense, but unlike this case, none of those petitions presented as strong a vehicle for deciding the issue. In *Wyatt*, the question was squarely presented by the Ninth Circuit's decision and debated extensively by the parties at the certiorari stage. *Compare* Petition for Certiorari, *Alameida v. Wyatt*, No. 03-10625, at 6-9, *with* Brief of Respondent in Opposition, *Alameida v. Wyatt*, No. 03-10625, at 6-8. Since this Court denied certiorari in *Wyatt*, however, two additional circuits – the Fourth and the Tenth Circuits – have taken opposite positions on the question presented, thereby widening the split among the circuits. *Compare Anderson*, 407 F.3d at 681 (adopting majority view that non-exhaustion is an affirmative defense), *with Steele*, 355 F.3d at 1210 (adopting the minority view that exhaustion must be pleaded by the plaintiff to survive dismissal).

Two other recent petitions attempted to raise the issue but in neither case was the issue

---

[12](...continued)
affirming the district court because the Sixth Circuit applied it in conjunction with its heightened pleading standards.

properly presented. In *Steele*, the petitioner attempted to raise the issue, but as the United States accurately noted in its brief in opposition, the Tenth Circuit's discussion of the issue was *dicta* – not holding – and the United States raised exhaustion as an affirmative defense, thereby mooting any challenge to the issue. *See* Brief for the United States in Opposition, *Steele v. Bureau of Prisons*, No. 03-10625, at 8 ("[T]he court of appeals' statement about which party bears the burden of raising exhaustion was not presented by the facts of th[e] case nor was it necessary to its decision. The government specifically raised exhaustion in its initial response to the complaint as an affirmative defense and provided documentation to substantiate the failure to exhaust."). The same is true with respect to *Boyd v. Corrections Corp. of Am.*, 380 F.3d 989 (CA6 2004), *cert. denied sub nom. Allen v. Corrections Corp. of Am.*, 125 S.Ct. 1639 (2005), where "the issue was not raised in the Court of Appeals, nor was it raised in the District Court," and the respondents' answer to the complaint "clearly raise[d] the exhaustion requirement" as an affirmative defense. *See* Brief for the Respondent in Opposition, *Allen v. Corr. Corp. of Am.*, No.04-784, at 7-8.

Unlike the *Steele*, and *Allen* petitions, this petition comes to this Court with this important issue squarely presented. Since the *Wyatt* petition was filed and denied, the issue has further percolated among the courts of appeals, such that ten of the thirteen circuits have now taken positions on the issue and aligned themselves in a 3-7 split. By granting this petition, this Court can bring needed uniformity to this important procedural issue that affects *every one of the over-20,000 PLRA* suits filed each year.

B. The Federal Courts of Appeals Are Intractably and Increasingly Split Over Whether the PLRA Prescribes a "Total Exhaustion" Rule that Requires Federal Courts to Dismiss a PLRA Plaintiff's Complaint for Failure to Exhaust Administrative Remedies Whenever There Is a Single Unexhausted Claim, Despite the Presence of Other Exhausted Claims

This petition also provides this Court an opportunity to resolve whether the PLRA prescribes a "total exhaustion" rule that requires federal courts to dismiss a PLRA plaintiff's complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims – another issue over which the federal courts of appeals are intractably and increasingly divided. The seven federal courts of appeals that have confronted mixed complaints – containing both exhausted and unexhausted claims – have responded in three ways. Three courts of appeals have adopted a strict total exhaustion requirement. Another has adopted a total exhaustion requirement but allows PLRA plaintiffs to amend their complaints to remove unexhausted claims. Finally, three more practice "partial exhaustion" by dismissing only those claims that are unexhausted. The district courts in circuits which have not yet taken a position are similarly divided. This confusion throughout the federal judiciary, as the State of Michigan itself conceded just last Term, requires this Court's intervention. *See* Brief of the States of California et al. as *Amici Curiae*, *McBride v. Ortiz*, No. 04-668 [hereinafter *Ortiz Amici* Br.], at 3-6.

Three courts of appeals – the Third, Sixth, and Tenth Circuits– have adopted a strict total exhaustion requirement by dismissing the entirety of a PLRA plaintiff's complaint if it contains even one unexhausted claim or party. As already outlined *supra*, the "total exhaustion" rule applied by the Sixth Circuit in this case "applies such that a 'mixed' complaint, alleging both exhausted and unexhausted claims, must be completely dismissed for failure to exhaust

administrative remedies." *Jones Bey*, 407 F.3d at 805; *see also id.* at 806 ("We now * * * hold[] that total exhaustion is required under the PLRA."). In reaching this conclusion, the Sixth Circuit agreed with the Tenth Circuit's decision in *Ross*, *see id.* at 806, 807, which held that "the presence of unexhausted claims in [a PLRA plaintiff's] complaint required the district court to dismiss his action in its entirety," *Ross*, 365 F.3d at 1189. The Third Circuit recently reached the same conclusion. *See Vazquez v. Ragonese*, No. 05-1203, 2005 WL 1842273, *1 (CA3 Aug. 4, 2005) (affirming district court's dismissal of prisoner's civil rights complaint where prisoner "exhausted his administrative remedies only with respect to his allegations of retaliation * * * [but] failed to exhaust his available administrative remedies with respect to all other claims"); *see also Rivera v. Whitman*, 161 F. Supp. 2d 337, 343 (D.N.J. 2001) (embracing total exhaustion rule); *but see also Boyd v. Pugh*, No. Civ. 3:CV-04-1761, 2005 WL 1430087, *3 n.1 (M.D. Pa. June 17, 2005) (rejecting total exhaustion rule).

The Third Circuit's position on the issue is devoid of reasoning, *see Vazquez*, 2005 WL 1842273, at *1, but the Sixth and Tenth Circuits have reasoned that both the PLRA's text and various policy considerations mandate their total exhaustion rule. According to these courts, because the exhaustion provision states that no "action" shall be brought in federal court until administrative remedies have been exhausted, 42 U.S.C. § 1997e(a), but the subsection prescribing rules for dismissal refers to "actions" or "claims," *id.* § 1997e(c)(1) & (2), Congress intended to require prisoners to exhaust administrative remedies on all claims before commencing an action. *See Jones Bey*, 407 F.3d at 807; *see also Ross*, 365 F.3d at 1190. These courts also reasoned that a total exhaustion rule furthers Congress' stated policy behind the PLRA of "reduc[ing] the sheer number of prisoner suits, especially frivolous ones." *Jones Bey*,

407 F.3d at 807; *see also Ross*, 365 F.3d at 1190. Finally, these courts analogized their total exhaustion rules to the total exhaustion rule adopted by this Court in the habeas context and reasoned that the comity concerns present in the habeas context are equally present in the prison conditions context. *See Jones Bey*, 407 F.3d at 807-08 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973)); *see also Ross*, 365 F.3d at 1189-90.

In contrast, the Eight Circuit has applied the total exhaustion rule but has done so with flexibility that prevents undue prejudice to prisoners. In *Graves v. Norris*, 218 F.3d 884 (CA8 2000), a short *per curiam* opinion, the Eighth Circuit held that "[w]hen multiple prison condition claims have been joined * * * § 1997e(a) requires that all available prison grievance remedies must be exhausted as to all of the claims." *Id.* at 885. Subsequently, however, the Eight Circuit modified its total exhaustion rule in *Kozohorsky v. Harman*, 332 F.3d 1141 (CA8 2003). There, the court held that district courts within the Eighth Circuit must allow PLRA plaintiffs to cure defects in their complaints that run afoul of the total exhaustion rule by amending their complaints to delete any unexhausted claims. *See id.* at 1144 (holding that "the District Court abused its discretion" by denying the plaintiff's "request to amend his complaint * * * dismiss [the unexhausted defendant and] cure[] the defect necessitating dismissal"). Like the Sixth and Tenth Circuits, *See Jones Bey*, 407 F.3d at 807-08; *see also Ross*, 365 F.3d at 1189-90, the Eighth Circuit looked to this Court's habeas jurisprudence regarding mixed habeas petitions but concluded that this Court's habeas jurisprudence supports a rule allowing PLRA plaintiffs to amend their complaints to remove unexhausted claims, *see Kozohorsky*, 332 F.3d at 1144 (discussing *Rose v. Lundy*, 455 U.S. 509, 510, 512 (1982)).

Yet three other courts – the Second, Fifth, and Seventh Circuits – have either expressly

adopted, or implicitly adopted through practice, a partial exhaustion rule, under which unexhausted claims shall be dismissed and exhausted claims shall go forward. In *Ortiz v. McBride*, 380 F.3d 649 (CA2 2004), *cert. denied*, 125 S.Ct. 1398 (2005),[13] the Second Circuit expressly rejected the Tenth Circuit's decision in *Ross*, concluding that the factors discussed by the Tenth Circuit weighed in favor of a partial – rather than a total – exhaustion rule. *See id.* at 656-63. In particular, the Second Circuit found significant that non-exhaustion is not listed among the grounds on which a district court may dismiss a PLRA plaintiff's "action" or "claims" under § 1997e(c). *See id.* at 657. The Second Circuit also reasoned that, contrary to *Ross*'s analysis, a total exhaustion rule would invite piecemeal litigation, thereby increasing the number of PLRA suits and frustrating Congress' stated intent to reduce such suits. *See id.* at 658-59.

---

[13] Although the second question presented in this petition was squarely presented and debated extensively by the parties and *amici* at the certiorari stage in *Ortiz*, this case is a preferable vehicle for deciding the issue. *Compare* Petition for Certiorari, *McBride v. Ortiz*, No. 04-668, at 6-18, *and Ortiz Amici* Br. at 3-9, *with* Brief for the Respondent in Opposition, *McBride v. Ortiz*, No. 04-668 [hereinafter *Ortiz* BIO], at 4-16. First, since this Court denied certiorari in *Ortiz*, two additional circuits – the Third and the Sixth Circuits – have taken positions on the issue, thereby widening the split among the circuits. *See Vazquez v. Ragonese*, 2005 WL 1842273, at *1; *Jones Bey*, 407 F.3d at 806. Second, the *Ortiz* petitioners had repeatedly conceded in the proceedings below that, on the facts of that case, application of the total exhaustion rule was unnecessary. *See Ortiz* BIO at 8.

Finally, the *Ortiz* petition sought interlocutory review of the Second Circuit's decision dismissing the respondent's one unexhausted claim and allowing his remaining exhausted claim to go forward. *See Ortiz*, 380 F.3d at 656, 663; *see also Ortiz* BIO at 7. Accordingly, by the time the case came before this Court at the certiorari stage, the petitioner's complaint was "no longer a 'mixed complaint,'" and the petitioner's unexhausted claim was "out of the case and incapable of being reinstated." This posture made *Ortiz* an imperfect vehicle – in stark contrast to the instant petition – for this Court's review. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory status of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition); *see also Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); *see also* Robert L. Stern et al., SUPREME COURT PRACTICE § 4.18, at 258 n.59 (8th ed. 2002) (noting that this Court routinely denies petitions challenging interlocutory determinations that have been mooted or may be mooted by the conclusion of the lower courts' proceedings).

Finally, the Second Circuit found that *Ross*'s "heavy reliance on * * * habeas 'total exhaustion' principles [wa]s misplaced" because prison grievance systems are distinct in a number of significant ways from state courts adjudicating criminal appeals and collateral attacks on an underlying conviction. *Id.* at 660-62.

The Seventh Circuit has not addressed the total exhaustion issue directly but has practiced partial exhaustion by dismissing only unexhausted claims when a mixed complaint has been filed. *See Lewis v. Washington*, 300 F.3d 829, 836 (CA7 2003) (affirming dismissal of one claim for failure to exhaust but remanding for determination of whether other claim was exhausted); *Dixon v. Page*, 291 F.3d 485, 489-90 (CA7 2002) (affirming partial dismissal for failure to exhaust); *see also Henderson v. Sebastian*, No. 04-C-0039-C, 2004 WL 1946398, *5 (W.D. Wis. Aug. 25, 2004) ("I view the [Seventh Circuit's] tacit rejection of a total exhaustion requirement in § 1983 actions as consistent with the Second Circuit's holding [in *Ortiz*]. I believe that partial dismissal is the proper course to take addressing a suit containing both exhausted and unexhausted claims."). The Fifth Circuit has also practiced partial exhaustion by dismissing only unexhausted claims from a mixed PLRA complaint. *See Johnson*, 385 F.3d at 533.

In the three circuits in which the issue has been addressed at only the district court level – the First, Fourth, and Ninth Circuits – the district courts' decisions reveal similar divisions. The District of Maine, to our knowledge the only district court within the First Circuit to confront the issue, has embraced the total exhaustion rule. *See Donovan v. Magnusson*, No. Civ. 03-226-B-W, 2004 WL 1572598, *2 (D. Me. June 7, 2004). The two district courts within the Fourth Circuit that, to our knowledge, have confronted the issue are split. *Compare Johnson v. True*, 125 F. Supp. 2d 186, 188 (W.D. Va. 2000) (rejecting total exhaustion rule), *with*

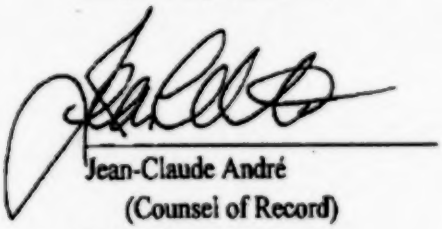
Cummings v. Rubenstein, No. Civ. A. 5:03-2195, 2004 WL 3312062, *9 (S.D.W. Va. Sep. 30, 2004) (embracing total exhaustion rule). Finally, the dozens of district courts within the Ninth Circuit that have confronted the issue are similarly split. *Compare, e.g., Ramirez v. Bray*, No. C 04-3769 MMC (PR), 2005 WL 2249900, *1-*2 (N.D. Cal. Sep. 15, 2005) (applying "total exhaustion" rule); *Smith v. Villanueva*, No. CV04-1211-MO, 2005 WL 2105013, *1 (D. Or. Aug. 22, 2005) (same); *Ornelas v. Giurbino*, 358 F. Supp. 2d 955, 962 (S.D. Cal. 2005) (same); *Thorp v. Kepoo*, 100 F. Supp. 2d 1258, 1263 (D. Haw. 2000) (same), *with Singleton v. Morales*, No. CV F 035557RECLJOP, 2005 WL 2064145, *3 (E.D. Cal. Aug. 25, 2005) (rejecting "total exhaustion" rule); *Clark v. Mason*, No. C04-1647C, 2005 WL 1189577, *9 (W.D. Wash. May 19, 2005) (same); *Blackmon v. Crawford*, 305 F. Supp. 2d 1174, 1179 (D. Nev. 2004) (same); *Lozeau v. Lake County, Montana*, 98 F. Supp. 2d 1157, 1167 (D. Mont. 2000) (same); *Cooper v. Garcia*, 55 F. Supp. 2d 1090, 1095 (S.D. Cal. 1999) (same).

As with the first question presented in this petition, it is clear that, were this case decided in a circuit without a heightened pleading requirement and without a total exhaustion rule, petitioner's three exhausted claims would go forward. Surely, a PLRA plaintiff's ability to test the merits of his exhausted claims should not turn on such geographic whims. Without a definitive ruling from this Court, the PLRA's exhaustion requirement will continue to be applied inconsistently in the courts across the country.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Jean-Claude André
(Counsel of Record)
IVEY, SMITH & RAMIREZ
2602 Cardiff Ave.
Los Angeles, CA 90034
(310) 558-0932

October 13, 2005

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 05a0506n.06
Filed: June 15, 2005

No. 03-2576

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LORENZO L. JONES,	)	
	)	ON APPEAL FROM THE
Plaintiff-Appellant,	)	UNITED STATES DISTRICT
	)	COURT FOR THE EASTERN
v.	)	DISTRICT OF MICHIGAN
	)	
BARBARA BOCK, Warden, et al.,	)	**OPINION**
	)	
Defendants-Appellees.	)	

BEFORE: BATCHELDER and COLE, Circuit Judges; REEVES, District Judge*

PER CURIAM. Plaintiff-Appellant Lorenzo Jones appeals a district court order dismissing his action brought pursuant to 42 U.S.C. § 1983 for violations of the First, Eighth, and Fourteenth Amendments of the United States Constitution. For the reasons that follow, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

On November 14, 2000, Plaintiff-Appellant Lorenzo Jones sustained serious injuries from a motor vehicle accident while he was in custody of the Michigan Department of Corrections. Jones alleges that after the accident, various prison officials required him to complete tasks which aggravated his injuries. He argues, *inter alia*, that this action constituted deliberate indifference to

*The Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

his serious medical needs in violation of the Eighth Amendment of the United States Constitution. The defendants sought dismissal of the complaint based on Jones's failure to exhaust administrative remedies as required by the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) ("PLRA"), codified at various sections of 28 and 42 U.S.C. The district court granted the motion. This appeal followed.

II. ANALYSIS

The district court did not err in dismissing the claims against the prison officials based on Jones's failure to exhaust his administrative remedies. The PLRA requires plaintiffs to exhaust all administrative remedies before bringing an action in federal court regarding prison conditions. 42 U.S.C. § 1997e(a). This Circuit follows the "total exhaustion" rule, meaning that we must dismiss a complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims. *See Bey v. Johnson*, 407 F.3d 801, 806 (6th Cir. 2005) ("We now join the Tenth and Eighth Circuits in holding that total exhaustion is required under the PLRA."). An action is one regarding prison conditions where it arises under federal law and concerns, *inter alia*, the "effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2).

This Court has held that in order to meet the exhaustion requirement of the PLRA, a prisoner must either attach a copy of his prison grievance forms to the complaint or state the nature of the remedies pursued and the result of each process. *See Knuckles-El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000). Jones stated in his complaint that he had exhausted his administrative remedies. However, he neither attached the grievance forms to his complaint nor described the remedies he

pursued and the outcome. The fact that the defendant later provided evidence that Jones may have exhausted some of his claims is irrelevant under the PLRA and Sixth Circuit precedent. *See Baxter v. Rose*, 305 F.3d 486, 488-90 (6th Cir. 2002). Furthermore, even if Jones had shown he had exhausted some of his claims, the district court properly dismissed the complaint because Jones did not show that he had exhausted all of his claims. *See Bey*, 407 F.3d at 806. Accordingly, Jones's prison-conditions claim was properly dismissed as he did not comply with the exhaustion requirement, as defined by this Court's precedent.

III. CONCLUSION

For the preceding reasons, we **AFFIRM** the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CLOSED

03 SEP 25 P 4:48

ORIGINAL

LORENZO JONES,

Plaintiff,

vs

WARDEN BOCK, ET AL

Defendants.

_____/

U.S. DIST. COURT CLERK
EAST DIST. MICH.
DETROIT

Case No: 02-74336
Honorable Victoria A. Roberts

ORDER ADOPTING REPORT AND RECOMMENDATION, IN PART

I. Introduction

This matter is before the Court on Defendants' 12(b)(6) Motion to Dismiss [**Doc. 15**]. Plaintiff, proceeding *pro se*, is a prison inmate whose complaint alleges that as a result of Defendants' indifference to his condition, he was forced into a physical assignment which aggravated previous injuries. Defendants move to dismiss for failure to comply with the exhaustion requirement of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). Plaintiff responded. Magistrate Judge Steven Pepe issued a Report and Recommendation recommending that certain of the Defendants--Bock, Chaplin, Konkle and Aldabaugh--should be dismissed for failure to state a claim. The Magistrate Judge recommended, however, that the claims against Defendants Morrison and Opanesenko should not be dismissed, finding that Plaintiff had exhausted constitutional claims. Both Plaintiff, and Opanesenko and Morrison, filed objections.

BEST AVAILABLE COPY

II. FACTUAL BACKGROUND

The Court has conducted a *de novo* review of the pleadings and papers filed. The Court accepts the Magistrate's recommendation with respect to Bock, Chaplin, Konkle and Aldabaugh. However, the Court overrules the Magistrate's finding concerning Morrison and Opanesenko.

In order to effectuate the exhaustion requirement of 42 U.S.C. § 1997e(a), the PLRA, a prisoner must plead his claims with specificity and show that they have been exhausted, by attaching a copy of the applicable dispositions to the complaint, or, in the absence of any documentation, describe with specificity the administrative proceeding and its outcome. *Knuckles-El v Toombs*, 215 F.3d 640, 642 (6th Cir. 2000). Failure to demonstrate exhaustion with the complaint can result in dismissal for failure to state a claim. *Baxter v. Rose*, 305 F. 3d 486, 489 (6th Cir. 2002). Moreover, grievances filed in an attempt to exhaust administrative remedies must name the individual subjects of the grievance so prison officials can address the claims before a suit is filed in federal court. *Curry v Scott*, 249 F.3d 493, 505 (6th Cir. 2001).

In his Complaint, Plaintiff states that he filed the necessary grievances, providing dates on which such grievances were filed, but he only states that the grievances "cit[ed] each instant in which [sic] plaintiff is alleging in this complaint." Compl. at 2. Plaintiff does not explain the specific issues raised by the grievance or why the grievance and its appeals were denied. This explanation is required, so that the Court can make a finding concerning the exhaustion requirement.

That Plaintiff attached the Step I grievance and the Step II and III appeals to his

responses to the motion to dismiss, does not satisfy the exhaustion requirement. The *Baxter* court held that a prisoner cannot satisfy the exhaustion requirement by amending his complaint. *Baxter v Rose*, 305 F. 3d at 489. Further, the documentation regarding grievances supplied by the Defendants as part of their motion to dismiss does not cure Plaintiff's failure to properly plead exhaustion. The burden of production and proof is on the prisoner. And, the PLRA establishes a unique procedure under which the court, not the parties, is required to evaluate whether a claim on which relief can be granted has been set forth in the complaint. "Courts would be unable to screen cases effectively if plaintiffs were able, through, ambiguous pleading, to avoid dismissal of claims on which relief could not be granted." *Baxter*, 305 F. 3d at 490.

Based on the foregoing, the Court finds that Plaintiff's claim against these two Defendants must be dismissed as well, for Plaintiff's failure to state a claim upon which relief can be granted. The Court need not reach Defendants' argument that Plaintiff's Complaint must be dismissed for his failure to totally exhaust all claims. Judgment is to enter against Plaintiff in favor of all Defendants.

IT IS SO ORDERED.

Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: SEP 25 2003

APPENDIX C

ORIGINAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LORENZO L. JONES, #176204

Plaintiff,

Case No. 02-74336

vs.

HONORABLE VICTORIA A. ROBERTS
HONORABLE STEVEN D. PEPE

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF CORRECTIONS, B. BOCK, V. CHAPLIN, P. MORRISON, OFFICER OPANASENKO, JANET KONKLE, AND AHMED ALDABAUGH,

Defendants.
_____/

FILED
Jun 30 11 26 AM '03
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

Lorenzo Jones ("Plaintiff") is a prisoner in the custody of the Michigan Department of Corrections ("MDOC"). On November 15, 2002, he filed a complaint against the above named defendants pursuant to 42 U.S.C. § 1983, alleging violations of his rights under the First, Fourth, and Fourteenth Amendments. Plaintiff is proceeding *in forma pauperis*. Defendants have filed a motion to dismiss and a motion to stay discovery, both of which were referred for hearing and determination pursuant to 28 U.S.C. § 636(b)(1)(A).[1] For the following reasons, defendants' motion to dismiss should be GRANTED IN PART. Plaintiff's claims against Defendants Bock, Chaplin, Konkle, and Aldabaugh should be DISMISSED for

[1] Because Defendants' motion to dismiss is a dispositive motion, the undersigned Magistrate Judge may issue only a Report and Recommendation, not a final determination, on that motion. 28 U.S.C. § 636(b)(1)(A).

failure to state a claim; however, Plaintiff has exhausted federal constitutional claims with respect to Defendants Morrison and Opanasenko and, thus, these claims should not be dismissed at this time.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 2000, Plaintiff was involved in a motor vehicle accident while in the custody of MDOC, which resulted in significant injury. Plaintiff alleges that he suffered a C5-6 fracture dislocation with myelopathy which required fusion surgery. He also suffered a hematoma to the spinal cord, hairline fracture to his left arm, abrasions on his scalp, lower back injuries, upper and lower extremity weakness on the left side, and numbness below his neck.

On or around July 19, 2001, Defendant Morrison, who determines the work assignments of prisoners at the facility in which Plaintiff is incarcerated, assigned Plaintiff to a position as the "Big Yard Equipment Handler," which involves lifting, standing, bending, stooping, and passing out equipment such as the baseball equipment bag, horseshoes, and basketballs. Plaintiff claims that he notified Morrison of his injuries, but that the assignment was not changed. Plaintiff reported to this assignment on or around July 23, 2001, and informed the staff member in charge, Defendant Opanasenko, that he could not perform the duties required because of his injuries. Plaintiff wore a neck brace and a left leg brace and walked with a cane. Allegedly, Opanasenko stated that Plaintiff was faking his injuries and told Plaintiff that he could either perform his work assignment "or suffer the consequences." Plaintiff claims that he chose to work in order to avoid receiving a major misconduct ticket; as

a result, he aggravated his injuries. Plaintiff also claims that Opanasenko harassed him by threatening to place Plaintiff in segregation if he did not perform his job and by telling a superior officer that Plaintiff was staring at him in a threatening manner. Plaintiff finally asserts a retaliation claim by stating that Defendant Opanasenko issued a false work evaluation. Essentially, Plaintiff is alleging First Amendment retaliation and Eighth Amendment deliberate indifference claims against Opanasenko and a deliberate indifference claim against Morrison.

Plaintiff also asserts that Defendants Chaplin, a deputy warden who apparently is in charge of approving work assignments; Warden Barbara Bock; Konkle, a registered nurse; and Aldabaugh, a physician,[2] either knew or should have known of Plaintiff's alleged inability to work and should have rectified the situation. He asserts that Defendant Chaplin violated the First, Eighth, and Fourteenth Amendments and that Bock, Konkle, and Aldabaugh violated the Eighth Amendment through their deliberate indifference to his medical needs. Finally, Plaintiff alleges a claim of respondeat superior against MDOC. On November 19, 2002, District Judge Victoria Roberts dismissed Plaintiff's claims against MDOC and the State of Michigan because those defendants were entitled to immunity under the Eleventh Amendment.

On February 13, 2003, Defendants Bock, Chaplin, Morrison, and Opanasenko filed a Rule 12(b)(6) motion to dismiss for failure to exhaust and a motion to stay discovery. Plaintiff responded to the Rule 12(b)(6) motion on February 21, 2003, and again on March 28, 2003.

---

[2] In his complaint, Defendants Konkle and Aldabaugh were named as Jane and John Doe. Plaintiff subsequently filed a motion to add Konkle and Aldabaugh as defendants, which motion was granted on January 17, 2003. These two defendants have not yet been served.

He claims he did comply with the exhaustion requirement by explaining the exhaustion process in his complaint and that Defendants attached evidence of exhaustion to their motion to dismiss.

II. ANALYSIS

A. Rule 12(b)(6)

In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept all well-pleaded allegations as true and construe them in the light most favorable to plaintiff. *Zinermon v. Burch*, 494 U.S. 113, 117 (1990); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 304 (2d ed. 1990). *See also Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); *Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976). A complaint will not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Moreover, *pro se* complaints are to be construed liberally. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Ordinarily, a court may decide a motion to dismiss only on the basis of the pleadings. *See Song v. City of Elyria, Ohio*, 985 F.2d 840, 842 (6th Cir. 1993). Additionally, the Prison Litigation Reform Act of 1995 ("PLRA") mandates that a court screen a prisoner's complaint and dismiss any claims raised that are frivolous, malicious, or fail to state a claim upon which relief may be granted, 28 U.S.C. § 1915A(b)(1); *McGore v. Wrigglesworth*, 114 F.3d 601, 608 (6th Cir. 1997), and may dismiss any such claim without first requiring exhaustion of administrative remedies. 42 U.S.C. § 1997e(c).

B. Exhaustion of Administrative Remedies

The PLRA, which applies to all claims filed after April 26, 1996, requires a prisoner to exhaust all administrative remedies before bringing a federal suit regarding prison conditions. 42 U.S.C. § 1997e(a). This requirement applies to all § 1983 claims that fall under "the definition of a 'civil action with respect to prison conditions' as set forth in 18 U.S.C.A. § 3626(g)(2)." *Hartsfield v. Vidor*, 199 F.3d 305, 308 (6th Cir. 1999) (footnote omitted) (applying exhaustion requirement to prisoner's equal protection claim). That section provides:

> the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison. . . .

18 U.S.C.A. § 3626(g)(2).

The exhaustion provision of the PLRA provides in pertinent part, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The Supreme Court has held that the exhaustion requirement must be satisfied, so long as some responsive action is available, even if the relief sought is not available. *Booth v. Churner*, 532 U.S. 731, 736-41, 740 n.5 (2001).

The Sixth Circuit has applied the requirements of the PLRA to hold that a prisoner who files a § 1983 claim involving prison conditions must *allege* and *show* that he has exhausted all available state administrative remedies. *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998). That Court has further stated that when filing a civil complaint regarding prisoner

conditions, "a prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and outcome:" *Knuckles-El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000). Failure to demonstrate exhaustion *with the complaint* can result in dismissal for failure to state a claim. *Baxter v. Rose*, 305 F.3d 486, 489 (6th Cir. 2002). Moreover, grievances filed in an attempt to exhaust administrative remedies must name the individual subjects of the grievances so prison officials can address the claims before a suit is brought in federal court. *Curry v. Scott*, 249 F.3d 493, 505 (6th Cir. 2001).

C. Factual Analysis

1. *Defendants Bock, Chaplin, Konkle, and Aldabaugh*

Although Plaintiff alleges First and Fourteenth Amendment[3] claims against Chaplin, he states no facts that would support such claims. Rather, Plaintiff's factual allegations potentially support only claims that these four defendants were deliberately indifferent to his medical needs by failing to remove him from the work detail he claims he could not perform. Yet, he has failed to state a claim upon which relief could be granted with respect to any of these defendants; Plaintiff's claims against these four defendants should be dismissed.

Prison officials may be liable under the Eighth Amendment for deliberate indifference to inmates' health or safety. *Farmer v. Brennan*, 511 U.S. 825, 832-35 (1994). In order to be

[3] Based upon Plaintiff's allegations, which are devoid of any due process or equal protection issues, his Fourteenth Amendment claim can be cited only for the fact that the Fourteenth Amendment applies to protections of the first eight amendments to the Constitution to the states.

held liable, the official must know of and disregard an excessive risk to inmate health or safety. *Id.* at 837. The prisoner must show that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. *Id.* at 841-42. A claim of deliberate indifference requires a showing of more than mere negligence and less than actual intent. *See Sanderfer v. Nichols*, 62 F.3d 151, 154 (6th Cir. 1995) (equating deliberate indifference with "criminal recklessness, which requires a subjective showing that the defendant was aware of the risk of harm."); *Gibson v. Foltz*, 963 F.2d 851, 853 (6th Cir. 1992) ("Obduracy or wantonness, not inadvertence or good faith error, characterizes deliberate indifference."); *Ribble v. Lucky*, 817 F. Supp. 653, 655 (E.D. Mich. 1993) (finding even "gross negligence" by prison officials insufficient to support a claim of deliberate indifference).

Thus, to satisfy this objective component, a plaintiff must allege a deprivation that is "sufficiently serious." "[O]nly those violations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). Additionally, the Court has required a showing of "extreme deprivations . . . to make out a conditions-of-confinement claim." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992).

A medical need is "serious" if it has been diagnosed by a physician as requiring treatment or is so obvious that a lay person would easily recognize the necessity for a doctor's attention. *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988). A serious ailment requires immediate attention or is potentially life-threatening: "[a] 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and

wanton infliction of pain.'" *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992) (citation omitted), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997). *Farmer* explains further that in order to demonstrate the subjective element of deliberate indifference, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. . . ." 511 U.S. at 836-37. This subjective element may be proven, however, when circumstantial evidence shows that the risk of harm was so obvious that an official must have known of its existence. *Ewolski v. City of Brunswick*, 287 F.3d 492, 513 n.7 (6th Cir. 2002) (citing *Farmer*, 511 U.S. at 842).

Here, Plaintiff makes no assertions that any of these defendants had any direct role in the job assignment, and makes only conclusory allegations that any of these defendants knew of a serious risk of harm to Plaintiff or actually drew such an inference. Without more detail, such conclusory assertions cannot be the basis of a § 1983 claim. *See Ana Leon T. v. Federal Reserve Bank*, 823 F.3d 928, 930 (6th Cir. 1987); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986).

He claims that Defendant Chaplin must agree to all work assignments, but makes no assertion that Chaplin actually knew of facts from which he could infer the existence of a substantial risk of harm, nor does he provide concrete assertions that Chaplin actually drew such an inference. The same is true of his assertions against Defendant Bock. With regard to nurse Konkle and Dr. Aldabaugh, Plaintiff states only that they had the duty to inform other MDOC officials that he could not perform the duties of the equipment handler. Even if such a duty exists, and even if the failure to inform other MDOC staff members of the extent of

Plaintiff's impairments was negligent, he has not alleged that these two health care workers actually drew the inference that a serious risk of harm existed. Medical malpractice, without more, does not constitute an Eight Amendment violation.

Rather, he seems to assume that because he wore neck and leg braces and used a cane, these defendants should have determined that he could not perform his job because the risk of harm was obvious. Even assuming that all four of these defendants had knowledge of Plaintiff's condition, he makes only conclusory and unsupported assertions that his condition was sufficiently serious for the defendants' inaction to rise to the level of deliberate indifference. The fact that Plaintiff continued to suffer from his injuries does not necessarily mean he could not perform the job at issue. It is of note that of the medical records Plaintiff attached to his response to the motion to dismiss to support his claim that he could not work, the only document that sheds any light on his ability to work is a form completed by a physician noting that Plaintiff was unable to perform certain work between November 14, 2000 - the date of his injury - and March 12, 2001 - four months prior to the time he was assigned to the Big Yard Equipment Handler position. Considering Plaintiff's allegations in the light most favorable to him, it cannot be said that Plaintiff adequately alleged that these four defendants either knew of a serious risk of harm or drew such an inference. As such, Plaintiff cannot state a cognizable deliberate indifference claim against Defendants Bock, Chaplin, Konkle, and Aldabaugh, and these claims should be dismissed.

2. *Defendants Opanasenko and Morrison*

Plaintiff alleges that Defendants Morrison and Opanasenko were deliberately indifferent to his medical needs and that Opanasenko retaliated against him in violation of the First

Amendment. Based solely upon the allegations in his complaint viewed in the light most favorable to Plaintiff, he appears to have asserted cognizable constitutional claims in this regard. Thus, whether Plaintiff met the exhaustion requirement is a necessary consideration. In his responses to defendants' motion to dismiss, Plaintiff asserts both that he adequately described the exhaustion procedures in his complaint as permitted by *Knuckles-El* and that he submitted proper documentation of exhaustion in those responses. Although Plaintiff does state in his complaint that he filed the necessary grievances, providing the dates on which such grievances were filed, he only states that the grievances "cit[ed] each instant in which [sic] Plaintiff is alleging in this complaint." Compl. at 2. Yet, he does not explain the specific issues raised by the grievance or why the grievance and its appeals were denied. Without such explanation, this Court cannot make a finding that he described the process with the needed specificity.

Moreover, although Plaintiff attached the Step I grievance and the Step II and III appeals to his responses to the motion to dismiss, such conduct does not satisfy the exhaustion requirement. A prisoner may not amend a complaint to satisfy the exhaustion requirement when he has not complied with that requirement in the first instance. *Baxter*, 305 F.3d at 489. *Baxter* has been cited by at least one unpublished case to hold that *sua sponte* dismissal for failure to exhaust was proper even where a plaintiff submitted evidence of exhaustion after he had filed his complaint. *Zeigler v. Michigan*, 2003 U.S. App. LEXIS 2239 (6th Cir. Feb. 6, 2003) (unpublished). Thus, these arguments do not preclude dismissal.

Yet, Plaintiff also notes that in the motion to dismiss, *defendants* provided the documentation necessary to establish exhaustion and thus, dismissal of his claims is not

appropriate. This issue has not explicitly been addressed by this or any other circuit. Defendants do, in fact, attach documentation that indicates Plaintiff filed a Step I grievance which he appealed through Step III.[4]

---

[4] Defendants attach this documentation in an effort to show that Plaintiff failed to exhaust *all* of his claims, arguing that his failure to exhaust even one claim raised in the lawsuit requires dismissal of the entire complaint. Defendants' argument in this regard in unavailing. In support of this claim, defendants cite *Smith v. Federal Bureau of Prisons*, 300 F.3d 721 (6th Cir. 2002); *Linder v. Sundquist*, 2002 U.S. App. LEXIS 19662 (6th Cir. Sept. 18, 2002) (unpublished); and *Kemp v. Jones*, 2002 U.S. App. LEXIS 16058 (6th Cir. Aug. 6, 2002) (unpublished).

Both *Smith* and *Linder* dismissed the plaintiffs' claims for failure to exhaust; however, in both cases, the plaintiff had not exhausted *any* claims. *Smith*, *supra*, at 723; *Linder*, *supra*, at *4. In *Kemp*, the court did dismiss all of the plaintiff's claims despite the fact that some of those claims were exhausted. *Kemp*, *supra*, at *3-*4. The court cited *Mack v. DeWitt*, 2002 U.S. App. LEXIS 8609 (6th Cir. Apr. 30, 2002) (unpublished), to support this finding. *Id.* In *Mack*, however, the plaintiff's claims were dismissed because, as in *Smith* and *Linder*, the plaintiff did not attach any documentation to support a finding that he exhausted his administrative remedies for *any* of his claims. *Mack*, *supra*, at *4-*5. Because *Kemp* is not based on any authority that supports its ultimate holding, this Court should not follow *Kemp*.

Smeltzer v. Hook, 235 F. Supp. 2d 736, 2002 U.S. Dist. LEXIS 17686 (W.D. Mich. 2002), and *Keenan v. Twommey*, 2000 U.S. App. LEXIS 21200 (6th Cir. Aug. 10, 2000) (unpublished) (simply affirming, but not discussing, a district court ruling with the same reasoning as *Smeltzer*), neither of which are cited by defendants, provide some support for defendants' claim. *Smeltzer*, preferring "total exhaustion" over "claim exhaustion," focuses on the language of § 1997e(a), which requires exhaustion to be complete before a prisoner can bring an "action," and decides that failure to exhaust even one claim requires dismissal of the entire "action" rather than just that claim. *Smeltzer*, *supra*, at *20-21. *Smeltzer* also discusses policy arguments for requiring total exhaustion such as conservation of judicial resources, discouraging prisoners from raising unexhausted claims, and a similar requirement in habeas cases. *Id* at *23-25.

While *Smeltzer* distinguishes between dismissing "actions" and "claims," it is not clear that the different language indicates that Congress intended to require dismissal of an entire case when a prisoner fails to exhaust even one claim. Section 1997e(a) states that a prisoner may not bring an action without first exhausting available administrative remedies. Yet, once any unexhausted claims are dismissed, the action only involves exhausted claims, and even under defendants' theory, § 1997e(a) will be satisfied.

Additionally, the policy arguments set forth in *Smeltzer* are not convincing. The PLRA already provides significant motivation to exhaust. Although many prisoners fail to do so, many others have realized the effect of § 1997e(a) and at least attempt to carefully comply with the statute. While *Smeltzer* argues that judicial resources will be conserved by following this rule, the likely result is that a prisoner whose exhausted claims are dismissed under "total exhaustion" will simply refile his complaint alleging only the exhausted claims. *See Cooper v. Garcia*, 55 F.Supp. 2d 1090, 1095 (S.D.Cal. 1999); *Jenkins v. Toombs*, 32 F.Supp. 2d 955, 959 (W.D.Mich. 1999). As such, each such lawsuit will actually turn into two lawsuits and, assuming the statute of limitations does not bar refiling, the court will be required to address the issues regardless of "total exhaustion." *Cooper*, 55 F.Supp. 2d at 1094-95. In this case, the limitations period will not run until at least July 2004.

Thus, the first question that must be addressed is whether a complaint must be dismissed for failure to exhaust when a plaintiff does not demonstrate exhaustion with the complaint, but where the *defendant* provides evidence of exhaustion. This is a different situation than involved in *Baxter* and not one a Plaintiff could manipulate to try to avoid a dismissal as in *Baxter*.

Moreover, although *Smeltzer* analogizes to the habeas context in which prisoners are required to completely exhaust state remedies prior to filing suit, in habeas cases a federal court may order a stay of federal proceedings to allow a prisoner to exhaust state remedies – a remedy not generally available in prisoner § 1983 litigation. *See Duncan v. Walker*, 533 U.S. 167, 182-83 (2001) (Stevens, J., concurring) (suggesting that a stay to permit state exhaustion in *habeas* cases is proper); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002) (adopting Justice Stevens' argument in *Duncan*); *Freeman v. Francis*, 196 F.3d 641 (6th Cir. 1999) (holding that a prisoner's failure to exhaust prior to filing a § 1983 lawsuit requires dismissal); *Wright v. Morris*, 111 F.3d 414 (6th Cir. 1997) (noting that prior to passage of the PLRA, granting a stay in a prisoner's § 1983 lawsuit was permissible when exhaustion was not completed prior to filing, but that exhaustion prior to filing suit is now mandatory).

Recently, the Sixth Circuit has issued an unpublished decision adopting the "total exhaustion" approach. *Shorter v. Campbell*, 2003 U.S. App. LEXIS 3343, *5-*6 (6th Cir. Feb. 20, 2003) (unpublished) (citing *Julian-Bey v. Crowley*, 24 Fed. Appx. 393, 2001 U.S. App. LEXIS 26192 (6th Cir. Dec. 3, 2001) (unpublished order)). Both cases rely on *Brown v. Toombs*, 139 F.3d 1102 (6th Cir. 1998), to support their holdings. *Id.* ("*Brown* makes it explicit that a prisoner must exhaust his administrative remedies before filing his complaint. *Brown* makes no provision for a 'mixed' complaint. There must be exhaustion of every grievance filed." (citations omitted)). Essentially, *Shorter* and *Julian-Bey* reach the conclusion that because *Brown* did not explicitly indicate that "mixed" complaints were permissible it, in fact, rejected such a possibility.

To the contrary, published Sixth Circuit authority has indicated otherwise. *Knuckles-El v. Toombs*, 215 F.3d 640 (6th Cir. 2000), decided subsequent to *Brown*, stated

> [w]e reserve to another day the question of whether exhausted claims in a "mixed" complaint should be addressed when such claims otherwise meet the pleading requirements or whether such a complaint should be dismissed in its entirety. The complaint here does not meet the pleading requirements set forth in *Brown* . . . and it was therefore properly dismissed.

Knuckles-El, 215 F.3d at 642. The court explicitly differentiated between the requirements in *Brown* and the undecided question of whether a prisoner's complaint must be dismissed for failure to exhaust only some of the claims raised. While *Knuckles-El* did leave open the question of whether "total exhaustion" or "claim exhaustion" would be the correct method to adopt, it certainly did not interpret *Brown* as requiring "total exhaustion," and no subsequent published authority has interpreted *Brown* in the manner suggested by *Shorter*.

The primary purpose of the PLRA was to reduce the number of frivolous lawsuits and to provide for more efficient adjudication of non-frivolous suits filed by prisoners. *See, e.g., Porter v. Nussle*, 534 U.S. 516, 524-25 (2002); *Freeman v. Francis*, 196 F.3d 641, 644 (6th Cir. 1999). Protection of agency autonomy and promotion of judicial efficiency have also been cited as motivations behind the exhaustion requirement. *See, e.g., Brown v. Toombs*, 139 F.3d 1102, 1103-04 (6th Cir. 1998); *Wright v. Morris*, 111 F.3d 414, 421 (citing *McCarthy v. Madigan*, 503 U.S. 140 (1992), *superceded by statute on other grounds as noted in Booth v. Churner*, 532 U.S. 731, 739-40 (2001)).

When a defendant admits that certain arguments have been exhausted and/or supplies a court with demonstration of such exhaustion, certain of the above concerns behind the PLRA are either diminished or non-existent. Agency autonomy is no longer in question, as the defendant(s) – in this case, employees of MDOC, the agency at issue – shows that the agency had the opportunity to address certain of the complaints and deal with the issues internally before a lawsuit was filed. Especially when the defendant provides copies of the grievances and appeals filed, concerns of judicial efficiency are diminished because, as noted in *Porter v. Nussle*, "adjudication [can] be facilitated by an administrative record that clarifies the contours of the controversy." 534 U.S. at 525. Such documentation also helps a court begin to determine the relative merit or frivolity to a prisoner lawsuit – at least as much as in situations where the documentation is attached to the original complaint.

Moreover, while *Baxter* appears to require dismissal for the Plaintiff's failure to demonstrate exhaustion with the complaint despite these policy considerations, that case is distinguishable from the present case. In *Baxter*, the district court, holding that a *plaintiff*

cannot amend a complaint to cure a defect in pleading exhaustion, dismissed the plaintiff's complaint *sua sponte* because the prisoner had failed to show in his complaint that he had exhausted his administrative remedies. *Baxter*, 305 F.3d at 488-89. Indeed, in *Baxter*, plaintiff had not even alleged that he had completed the exhaustion requirement against the defendants. Plaintiff in the present case did allege that he had completed exhaustion against the Defendants, and even gave the precise dates on which the grievance and appeals were filed, but failed to attach the necessary documentation. The *defendants* did attach the missing documents evidencing exhaustion to their motion to dismiss prior to Plaintiff's attempt to supplement the record by attaching the same documentation. Defendants' motion was filed on February 13, 2003. This case was not referred to the undersigned until March 18, 2003. Thus, when the undersigned first received this case for consideration, proof of exhaustion was already present in the record through a filing provided by *defendants*. Were this Court to recommend *sua sponte* dismissal as envisioned in *Baxter*, which would often take place before supplemental evidence of exhaustion could be provided, such a recommendation and action would not greatly facilitate the policy considerations that lie behind the exhaustion requirement. Because the defendants supplemented the record *before* the present case was referred to the undersigned, *Baxter's* reasoning seems inapplicable here. Accordingly, there is no logical reason why the grievances attached to defendants' motion to dismiss should not be considered for exhaustion purposes. Because the statute of limitations has not run, and dismissal would be without prejudice, the case would likely be re-filed with documents on exhaustion that are before the Court attached.

Therefore, the next question is whether Plaintiff, through the grievance and appeals

attached to defendants' motion to dismiss, properly exhausted his claims against Defendants Morrison and Opanasenko. Defendants argue that although Plaintiff listed many people as subjects of his grievance, the body of the grievance dealt only with Plaintiff's poor work evaluation, upon which his First Amendment retaliation claim is partially based.

The grievance forms attached to Defendants' brief do show that the grievance was about Plaintiff's dispute with Officer Opanasenko over his claim he could not do the equipment handling job. He claims that after he complained to the "Classification Director" [Morrison] apparently about his job assignment, he was told to write a grievance. Plaintiff thereafter told Defendant Opanasenko that he could not physically do the job. Defendant Opanasenko allegedly began to harass him, insisted that Plaintiff pick up equipment and hand the items to other inmates, and stand around for 15-20 minutes, even though he still wore a neck brace and walked with a cane. Plaintiff claimed that Defendant Opanasenko "fabric[ated] an assignment evaluation form" and falsely indicated that Plaintiff had written that he sought to be removed from this detail. Defendant Opanasenko also allegedly threatened to write a ticket on Plaintiff for threatening behavior, but did not. Rather, he wrote the negative work evaluation. Plaintiff asserts generally that Morrison and Opanasenko were aware of his current condition related to his spinal cord injuries. He claims the "work assignment report" will cause Plaintiff irreparable harm hurting his chances for parole, and that these two defendants and others knew or should have known that their actions violated Plaintiff's First, Eighth, and Fourteenth Amendment rights. His grievance request for relief included an apology, suspension of Defendant Opanasenko for 7 days without pay, and removal of his negative job evaluation, and no work assignments without his "personal outside doctor's" approval and no "retaliatory actions"

against him. He even argued that "Qualified Immunity" should not shield the officials for civil damages.

At Step I, this was treated as a complaint only about the negative job evaluation which was upheld. Apparently at his interview on the grievance he "stated his only issue is that he was written a 'bad' work report that is not true".

At Step II, he complained that all of the individuals and issues were not addressed at Step I. The response indicated that "Classification" and Health Care" had cleared Plaintiff as "physically capable" for a light-duty detail like the handing out of recreation equipment. Yet, the grievance reviewer, Warden Bock, reasoned that because Defendant Opanasenko apparently signed the work evaluation both as "evaluator and Supervisor" it was improper. Thus, it was ordered to be removed from Plaintiff's file with Defendant Opanasenko allowed to "re-do" it and "have a supervisor sign it." Thus Warden Bock determined that the "[g]rievance is partially resolved at step II."

At Step III Plaintiff challenged the validity of the finding that he had been cleared by Health Care for the work assignment and claimed Warden Bock at Step II "attempt[ed] to side step and over look the issues at bar." He challenged Warden Bock permitting Officer Opanasenko to rewrite the work evaluation because of the "unreasonable practice by the Department of Corrections and it[s] agents," which would include the Classification Director specifically named at Step I. Plaintiff again asserted that the "first, eight and fourteenth Amendments protests (sic, "protects") Plaintiff from such practice and harm." He repeated his earlier demand for relief including his not being cleared for work without his personal Doctor's consent.

While not particularly "pretty" and quite conclusory, it cannot be said that this does not assert an Eight Amendment "deliberate indifference" claim against Defendants Morrison and Opanasenko and a First Amendment retaliation claim against Defendant Opanasenko. Plaintiff claims that Opanasenko harassed him and required him to perform the equipment handler position despite his injuries. Such allegations can be found sufficient for purposes of exhaustion. *Burton v. Jones*, 521 F.3d 569, 575 (6th Cir. 2003).

> [F]or a court to find that a prisoner has administratively exhausted a claim against a particular defendant, a prisoner must have alleged mistreatment or misconduct on the part of the defendant at Step I of the grievance process. In describing the alleged mistreatment or misconduct, however, we would not require a prisoner's grievance to allege a specific legal theory or facts that correspond to all the required elements of a particular legal theory. Rather, it is sufficient for a court to find that a prisoner's Step I problem statement gave prison officials fair notice of the alleged mistreatment or misconduct that forms the basis of the constitutional or statutory claim made against a defendant in a prisoner's complaint.

Id. As explained, this "fair notice" standard does not require a prisoner to provide all the details of the alleged wrongdoing and is in accord with the legislative purposes of § 1997e(a) as stated in *Porter*. *Id.* A prisoner must simply provide a sufficient statement to inform prison officials of his complaints and against whom they are directed.

While Plaintiff does not specifically name Morrison, the grievance specifically states that the "Classification Director," which is Morrison's position, and later Department of Correction "agents," required him to perform this work despite having knowledge that Plaintiff was incapable of its performance. Although the *Curry* case requires each defendant to be specifically named, where a plaintiff lists a particular position that is held by only one person, that requirement should be considered to be met.

Here, although the majority of Plaintiff's grievance does address the work report written by Opanasenko, Plaintiff also stated that his injury prevented him from performing the duties of an Equipment Handler and that both Opanasenko and the Classification Director (Morrison) required him to perform that job despite having knowledge of that fact. Mot. to Dismiss, Ex. A at 8-9. While not terribly specific, Plaintiff's grievance was sufficient to provide "fair notice" that he was grieving more than the work evaluation written by Opanasenko. He specifically raised claims that Opanasenko and Morrison should not have required him to perform the equipment handler position. The fact that the person writing the response to the Step I grievance did not address Plaintiff's allegations that Opanasenko and Morrison required him to perform work beyond his ability does not negate the fact that Plaintiff did raise those issues, albeit briefly, in his Step I grievance. He also notes that after informing Defendant Opanasenko of his condition, he was harassed and a ticket was threatened and a negative job evaluation written. This was coupled with a generalized claim that his First Amendment rights as well as his Eight Amendment rights were violated. Thus, it is found that the exhaustion requirement is satisfied with respect to Defendants Opanasenko and Morrison, and defendants' motion should be denied in that regard.

III. RECOMMENDATION

For the reasons stated above, IT IS RECOMMENDED that defendants' motion be GRANTED IN PART. Plaintiff's claims against Defendants Bock, Chaplin, Konkle, and Aldabaugh should be DISMISSED for failure to state a claim; however, his claims against Defendants Morrison and Opanasenko should not be dismissed at this time.

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within ten (10) days of service of a copy of this Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this report and recommendation. *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370,1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than twenty (20) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

Steven D. Pepe

Dated: July 30, 2003
Ann Arbor, Michigan

STEVEN D. PEPE
UNITED STATES MAGISTRATE JUDGE

Pursuant to Rule 9(d), Please
COPIES HAVE BEEN MAILED TO THE
FOLLOWING:
Laura Jones
Dwayne Campbell
on 7/30/03

BEST AVAILABLE COPY

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LORENZO L. JONES, #176204,

Plaintiff,

v

STATE OF MICHIGAN, et al,

Defendants.

No. 02-74336-DT

HON. VICTORIA A. ROBERTS
MAG. STEVEN D. PEPE

Lorenzo L. Jones #176204
Saginaw Correctional Facility (SRF)
9625 Pierce Road
Freeland, MI 48623

Christine M. Campbell (P31138)
Attorney for Defendants
Michigan Department of Attorney General
Corrections Division
P.O. Box 30217
Lansing, MI 48909
(517) 335-7021

FILED
02 DEC 13 P 3:09

DEFENDANTS HEREBY REQUEST THAT THE COURT DISPENSE WITH ORAL ARGUMENT UNDER LOCAL RULE BECAUSE THE PRO SE PLAINTIFF IS CONFINED IN PRISON

DEFENDANTS BOCK'S, CHAPLIN'S, MORRISON'S AND OPANASENKO'S RULE 12(b) MOTION TO DISMISS FOR FAILURE TO COMPLY WITH THE EXHAUSTION REQUIREMENT OF THE PLRA

Defendants Bock, Chaplin, Morrison, and Opanasenko, by counsel, move pursuant to Fed. R. Civ. P. 12(b) and 42 U.S.C. § 1997e (a), for a Court Order dismissing Plaintiff's Complaint based upon those grounds set forth in Defendants' accompanying brief.

WHEREFORE, Defendants request that the Court to enter its Order dismissing the above action.

Respectfully submitted,

MICHAEL A. COX
Attorney General

Christine M. Campbell (P31138)
Assistant Attorney General
Corrections Division

Dated: February 11, 2003
Campbell\2002 FED\2002027760 JONES LORENZO\motion exhaust.doc

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LORENZO L. JONES, #176204,

Plaintiff,

v

STATE OF MICHIGAN, et al,

Defendants.

No. 02-74336-DT

HON. VICTORIA A. ROBERTS
MAG. STEVEN D. PEPE

Lorenzo L. Jones #176204
Saginaw Correctional Facility (SRF)
9625 Pierce Road
Freeland, MI 48623

Christine M. Campbell (P31138)
Attorney for Defendants
Michigan Department of Attorney General
Corrections Division
P.O. Box 30217
Lansing, MI 48909
(517) 335-7021

BRIEF IN SUPPORT OF DEFENDANTS BOCK'S, CHAPLIN'S, MORRISON'S AND OPANASENKO'S RULE 12(b) MOTION TO DISMISS FOR FAILURE TO COMPLY WITH THE EXHAUSTION REQUIREMENT OF THE PLRA

This is a pro se prisoner civil rights action under 42 U.S.C. § 1983. Plaintiff has sued Barbara Bock, former Warden of the Saginaw Correctional Facility (SRF); Valerie A. Chaplin, Assistant Deputy Warden; Paul Morrison, Classification Director, Michael Opanasenko, Corrections Officer; Janet Konkle, R.N.; and Ahmad Aldabagh, M.D. To the undersigned's knowledge, Ms. Konkle and Dr. Aldabagh have not been served. Defendants Bock, Chaplin, Morrison, and Opanasenko are represented by the Attorney General.

Plaintiff's complaint alleges that he had medical injuries from a vehicle accident in 2000, which prevented him from performing his job as a recreational equipment handler. Plaintiff alleges that he was nevertheless classified to this position and forced to work. Plaintiff alleges that he was harassed by Officer Opanasenko on August 20, 2001 "when the defendant attempted to make the plaintiff remain at the recreation shack and lift up the baseball bag and hand it to another prisoner that was requesting the bag." **Complaint ¶ 27**. Plaintiff admits that he refused, and states that defendant Opanasenko threatened to place plaintiff in segregation until plaintiff learned to do what he was told. **¶ 28**. Plaintiff alleges that Officer Opanasenko wrote a poor work evaluation on August 20, 2001. **¶ 33**. Plaintiff alleges the poor work evaluation written on August 20, 2001 was retaliatory because "appeared to be threaten." *Id.*

Although he asserts in ¶ 3 that he has exhausted all his administrative remedies, plaintiff did not attach any grievance documentation to his complaint, nor does his give a grievance code number anywhere in the complaint. Plaintiff alleges that he filed a Step III grievance appeal on November 2, 2001, but as of the date of the complaint (October 17, 2002), he had not had any response.

Defendants had MDOC Prisoner Affairs check their records. One grievance was located relevant to this complaint, SRF 2001-09-1068-02A (copy of all Steps attached, Def. Ex. A). The Step III response was returned to plaintiff on November 11, 2001. Plaintiff was at SRF from April 25, 2001 until January 24, 2003, so he should have received all the grievance responses.

Looking at the Step I grievance, plaintiff initially states, "On 8/29/01 Plaintiff talked to the Classification Director, whom [sic] at that time informed Plaintiff that he should write a grievance. This grievance is being written on the following staff members: Classification Director, Health Care, Warden, deputy Warden and Officer Opanasenko, in their professional

capacity." The body of the grievance, however, relates only to Officer Opanasenko, and the primary complaint is the "poor work evaluation" given by Officer Opanasenko.

Despite the fact that the grievance was untimely[1] and could have been rejected for that reason alone, a Step I response was provided. Plaintiff told the grievant interviewer that "his only issue is that he was written a 'bad' work report that is not true [and that] Grievant was angered that this may affect his upcoming Parole Hearing."

The grievance was considered resolved, because the work evaluation 363 was rewritten. See Def. Ex. B. Omitted from the rewritten 363 was the statement "I would like to be removed from this detail," and the 363 was appropriately signed by a supervisor. The aforementioned statement is what plaintiff claimed was false; he says he never made that statement.

The Prison Litigation Reform Act, 42 U.S.C. § 1997c(a), states that "no action shall be brought with respect to prison conditions under section 1983 or any other federal law" until the prisoner has exhausted available administrative remedies. This exhaustion requirement is mandatory and applies to all cases filed after April 26, 1996. *Freeman v. Francis*, 196 F. 3d 641 (6th Cir. 1999); *Wyatt v. Leonard, et al.*, 193 F. 3d 876 (6th Cir. 1999);*Wright v. Morris*, 111 F. 3d 414 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 263 (1997); *White v. McGinnis*, 131 F.3d 593 (6th Cir. 1997).

Before filing a lawsuit in federal court, a prisoner must exhaust all his administrative remedies as to *each* claim he brings against *each* defendant he intends to sue, and demonstrate exhaustion by attaching copies of the administrative proceedings and decisions to his complaint, or if not available, describing the proceedings with specificity. *Knuckles-El, et al., v. Toombs, et al.*, 215 F. 3d 640 (6th Cir. 2000); *Curry v. Scott*, 249 F.3d 493 (6th Cir. April 30, 2001). A

[1] The "incident date" is August 20, 2001, and the "Today's Date" is September 15, 2001. The Step I grievance was received on September 25, 2001.

prisoner must exhaust *all* his claims; a case cannot proceed where there is only partial exhaustion. *Smith v. Federal Bureau of Prisons*, 300 F. 3d 721 (6th Cir. 2002); *Linder v. Sundquist*, No. 02-5303, 2002 U.S. App. LEXIS 19662 (6th Cir. Sept. 18, 2002) (unpublished, copy attached); *Kemp v. Jones*, No. 01-2744, 2002 U.S. App. LEXIS 16058 (6th Cir. Aug. 6, 2002) (unpublished, copy attached).

The PLRA places the burden on demonstrating exhaustion squarely on the shoulders of the prisoner-plaintiff. Recently, the Sixth Circuit Court of Appeals reiterated the requirement that a prisoner plaintiff must demonstrate exhaustion by attaching copies of the administrative remedies proceedings to his complaint. *Baxter v. Rose*, 305 F.3d 486 (6th Cir. 2002)[2]. The Court emphasized that the time for proving exhaustion is with the filing of the *initial* complaint. The Court said:

> [A] prisoner may not amend his complaint to cure the failure to plead the exhaustion of administrative remedies, if his action is covered by the PLRA.
>
> The PLRA requires prisoners challenging "prison conditions" to exhaust all administrative remedies before bringing a Section 1983 Action. 42 U.S. C. § 1997e(a). In *Brown v. Toombs*, 139 F. 3d 1102 (6th Cir. 1998), **we required that a prisoner bringing such an action specifically allege in his complaint that he had exhausted all administrative remedies.** *Id.* **at 1104. We also required that the plaintiff attach to his complaint the disposition(s) of his available administrative remedies.** *Ibid.*
>
> [*Baxter*, 305 F. 3d at 488 (emphasis added)]

Moreover, in *Baxter*, the Court held that a prisoner cannot amend a defective complaint to meet the exhaustion requirement.

---

[2] *Baxter* appears to simply present a reiteration or clarification of existing law, since Sixth Circuit precedent has always required that a prisoner make an affirmative showing of exhaustion with his initial pleading. See, e.g., *Brown v. Toombs*, 139 F. 3d 1102 (6th Cir. 1998); *Knuckles-El v. Toombs*, 215 F. 3d 640 (6th Cir. 2000).

The Supreme Court made it clear in *Booth v. Churner*, 531 U.S. 956; 121 S. Ct. 1819; 149 L. Ed. 2d 958 (2001) that the exhaustion requirement of 42 U.S.C. § 1997e(a) was mandatory, and that no exceptions would be allowed. The Sixth Circuit so held in *Brown* and *Knuckles-El*. *Brown* and *Knuckles-El* also set forth the requirement that a prisoner attach the grievance (or other administrative remedy) documentation to his initial complaint. The Sixth Circuit made it clear in *Curry* that a prisoner must file a grievance and exhaust the grievance procedure as to *each* claim against *each* defendant named in the complaint. The Sixth Circuit also requires that a prison totally exhaust all his claims; a case cannot proceed where only some of the claims have been exhausted. *Smith v. Federal Bureau of Prisons*, 300 F. 3d 721; *Linder v. Sundquist*, No. 02-5303, 2002 U.S. App. LEXIS 19662; *Kemp v. Jones*, No. 01-2744, 2002 U.S. App. LEXIS 16058 (6th Cir. Aug. 6, 2002). Finally, the Sixth Circuit recently reiterated in *Baxter* that demonstration of exhaustion must be made with the initial complaint, and a prisoner may not later submit documentation establishing exhaustion.

It is evident that plaintiff only exhausted his "poor work evaluation" claim against defendant Opanasenko. He has not exhausted any of his other claims against Opanasenko, nor has he exhausted his claims against the other named defendants in this action.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Defendants respectfully request that this Court find that Plaintiff failed to satisfy the exhaustion requirement of the PLRA, and dismiss this action in its entirety.

Respectfully submitted,

MICHAEL A. COX
Attorney General

Christine Campbell

Christine M. Campbell (P31138)
Assistant Attorney General
Corrections Division

Dated: February 11, 2003

Campbell\2002 FED\2002027760 JONES LORENZO\jones.lorenzo.02-27760.1997ea brief.doc

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

SEE CASE FILE FOR ADDITIONAL DOCUMENTS OR PAGES THAT WERE NOT SCANNED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LORENZO L. JONES, #176204,

Plaintiff,

v

STATE OF MICHIGAN, et al,

Defendants.

No. 02-74336-DT

HON. VICTORIA A. ROBERTS
MAG. STEVEN D. PEPE

PROOF OF SERVICE

STATE OF MICHIGAN)
ss)
COUNTY OF INGHAM)

The undersigned, being first duly sworn deposes and says that on February 11, 2003, 2002 she personally mailed DEFENDANTS' MOTION TO STAY DISCOVERY, BRIEF IN SUPPORT, DEFENDANTS BOCK'S, CHAPLIN'S, MORRISON'S AND OPANASENKO'S RULE 12(b) MOTION TO DISMISS FOR FAILURE TO COMPLY WITH THE EXHAUSTION REQUIREMENT OF THE PLRA and BRIEF IN SUPPORT to the following:

TO: Lorenzo L. Jones #176204
Saginaw Correctional Facility (SRF)
9625 Pierce Road
Freeland, MI 48623

by sealing said envelope, affixing the necessary postage for first class mail thereon and placing said envelope in the United States mail at Lansing, Michigan.

Helene Lawrence
Legal Secretary

Campbell\2002 FED\2002027760 JONES LORENZO\POS.doc

BEST AVAILABLE COPY

APPENDIX E

Copy of: Clerk of The Court

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Lorenzo L. Jones,
Plaintiff,

V

Civil Case No. 02-74336-DT

Honorable: Victoria A. Roberts
Magistrate: Steven D. Pepe

STATE OF MICHIGAN et, al.
Defendant

Lorenzo L. Jones #176204 Plaintiff In Pro.se Ryan Correctional Facility 17600 Ryan Road Detroit, Michigan 48212	Christine M. Campbell P31138 Attorney For Defendants Attorney General Office Corrections Division P.O. Box 30217 Lansing, Michigan 48909

PLAINTIFF SUPPLEMENTAL RESPONSE
TO DEFENDANT'S MOTION TO DISMISS

NOW COMES The Plaintiff, Lorenzo L. Jones, through and by himself and pursuant Fed. R. of Civ. Pro. move that this Honorable Court deny the defendant's Motion to dismiss pursuant to Rule 12(b) and PLRA 42 U.S.C. § 1997(e)(a), alleging that the Plaintiff failed to exhaust administrative remedies and states in support thereof:

1. That Plaintiff exhausted all administrative remedies pertaining to all defendants contained in the Civil Rights Complaint as explained more fully in Plaintiff Brief in support of this Motion.

Dated: March 22,2003

Lorenzo L. Jones #176204
Ryan Correctional Facility
17600 Ryan Road
Detroit, Michigan 48212

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Lorenzo L. Jones,
Plaintiff,

V

Civil Case No. 02-74336-DT

Honorable: Victoria A. Roberts

Magistrate: Steven D. Pepe

STATE OF MICHIGAN et, al.
Defendant,

Lorenzo L. Jones #176204
Plaintiff In Pro.se
Ryan Correctional Facility
17600 Ryan Road
Detroit, Michigan 48212

Christine M. Campbell P31138
Attorney For Defendants
Attorney General Office
Corrections Division
P.O. Box 30217
Lansing, Michigan 48909

BRIEF IN SUPPORT OF PLAINTIFF'S
SUPPLEMENTAL RESPONSE TO DEFENDANTS MOTION TO DISMISS

Plaintiff, Lorenzo L. Jones, is a Pro.se. Plaintiff whom alleged that several prison officials violated his Civil Rights by placing him on a work assignment that was beyond his physical capabilities, that Plaintiff was harassed and retaliated against by at least one of the defendants.

On February 13,2003, the defendants filed a Motion pursuant to Rule 12(b) and 42 U.S.C. § 1997(e)(a), to dismiss, alleging that the Plaintiff had failed to exhaust all available State remedies and that Plaintiff failed to attach those exhausted remedies to the Complaint.

On February 15,2003, the Plaintiff filed his response alleging that all administrative remedies was exhausted.

On March 18,2003, the Honorable Victoria A. Roberts, referred this matter to this Honorable Court for Hearing and Determination

pursuant to 28 U.S.C. 636(b)(1)(A).

DEFENDANTS' CLAIMS WITHOUT MERIT

Dofendants first argued that the Plaintiff had failed to exhaust all available administrative remedies on several of the defendants in his Civil Rights Complaint.

In asking the Court to dismiss, the defendants relied on the authority of Knuckles-El V Toombs, et, al, 215 F3d 640 (6th Cir. 2000); Curry V Scott, 249 F3d 493 (6th Cir. 2001). In both the Knuckles-El Court, Supra at Id 641 and the Curry Court, Supra at Id 251-2, neither of the Plaintiff's had filed the necessary grievance or exhausted the necessary administrative remedies on several of the prison officials. Contrary to those Claims, Plaintiff in this Claim has exhausted all available remedies. Consequently, this Court must deny the defendants Motion to dismiss.

Next, the defendants claimed that the Plaintiff had failed to attach copies of the exhausted administrative remedies to the initial Complaint and that the Court should dismiss for that cause.

EXHAUST ADMINISTRATIVE REMEDIES

PLRA require that a prisoner [MUST] exhaust all available administrative remedies before filing a Complaint concerning prison condition. In this case, the Plaintiff filed a grievance alleging amongst other things, That defendants: officer Opanasenko, Health Care (Dr. Ahmad and Nurse Konkle), Classification (Morrison), Deputy Warden (Chaplin), and Warden (Bock), 'know, knew or should have known that their actions was in direct violations of plaintiff's,

First, Eighth and Fourteen Amendment Constitutional Rights and Civil Right, where all the above defendants required Plaintiff to work beyond that of his physical capabilities'. (see Exhibit-A-step I grievance and attached page hightlighted area). Contrary to the defendants assertion that Plaintiff did not exhaust the administrative remedies. Defendants in their pleading, supplies the Court with the exhausted administrative remedies.

WARDEN BOCK RESPONSE TO STEP II GRIEVANCE

In responding to Plaintiff allegation in step II grievance Warden Bock replied;

> 'He also alleges that he was not medically clear to work the detail issued, and the grieved parties knew or should have known, he could not perform those duties. Grievant has a special accommodation Notice in his file authorizing possession of a neck brace and wooden cane. Step I documents include verification from Health Care that Grievant was physically capable of working this assignment. Further, Classification specifically issued Grievnant a detail for Equipment Handler as a light-duty assignment, due to his medical condition. Grievant was appropriately given the job detail; Health Care verified that his medical condition does not preclude him from handing out recreation equipment. The other grieved parties, Warden Bock and ADW of programs, are not licensed medical staff, therefore must rely on Health Care's evaluation of the Grievant's medical limitation' (see Exhibit-B-step II grievance and response to step II grievance by Warden Bock). Had Plaintiff not grievance all of the above, Warden Bock would not have included the names and/or job titles in the response.

Next, the defendants alleged that the Complaint should be dismissed for Plaintiff's failure to attach copies of the exhausted administrative remedies to the initial Complaint. The defendants

cited no authorities to sustain the contention that the Complaint should be dismissed for this failure. Consequently to defendants assertion, due process will override any question of dismissal on these grounds.

In asserting the Claims, the Plaintiff adequately gave an explanation on the steps taken to exhaust the administrative remedies (see page 2 of initial Complaint). In pertinent part-a prisoner must exhaust all administrative remedies as to each claim against each defendant and demonstrate exhaustion by attaching copies of the process and the decision, or if not available, describing the proceedings. EMPHASIS ADDED. Brown V Toombs, 139 F3d 1102, 1104 (6th Cir.), cert. denied, ____ US ____; 142 LEd2d 69; 119 S Ct 88 (1998); KnucklesEl, et, al, V Toombs, et, al., 215 F3d 640 (6th Cir. 2000). Plaintiff assert that he adequately explained the steps taken, therefore complied with the requirements of exhaustion. In Michigan, the prison system has set up a III step administrative remedy system, Plaintiff herein, followed each step, received responses from each step, exhausted each step.

WHEREFORE, This Court should deny the defendants Motion to dismiss and allow the claims to continue on and be decided on it's merit.

Dated: March 22,2003

Lorenzo R. Jones #176204
Ryan Correctional Facility
17600 Ryan Road
Detroit, Michigan 48212

EXHIBIT-A-

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE FORM

4835-4247 10/94
CSJ-247A

Date Received at Step I _____ Grievance Identifier: [illegible]

Be brief and concise in describing your grievance issue. If you have any questions concerning the grievance procedure, refer to PD 03.02.130 and OP 03.02.130 available in the prison Law Library.

Name (print first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Lorenzo L. Jones/Johnson	176204	SRF	98-1200	8/20/01	9/15/01

What attempt did you make to resolve this issue prior to writing this grievance? On what date? 8/29/01
If none, explain why. "On 8/29/01 Plaintiff talked [illegible] to the Classification Director whom at the time [illegible] informed Plaintiff that he should write a grievan This grievance is being written on the following staff members: Classificati Director, Health Care, Warden, Deputy Warden and [illegible]Officer Opanasenko, their professional capacity.

State problem clearly. Use separate grievance form for each issue. Additional pages, using plain paper, may be used. Four copies of each page and supporting documents must be submitted with this form. The grievance must be submitted to the Grievance Coordinator in accordance with the time limits of OP 03.02.130.

On July 19,2001, Plaintiff was assigned to work yard crew as an equipment handler, "meaning" Plaintiff was to hand at prisoners request, horse shoes, baseball bag (that's full of gloves, balls and two bats), basket balls, etc. While on this job, Plaintiff informed supervising officer Opanasenko (E-9), that Plaintiff was unable to handle certain equipment, such as picking up horse shoes, and baseball bag or to stand around the recreation shack for long periods of time or bending and stooping. This officer began to harass Plaintiff the same day Plaintiff worked out in the shack. Plaintiff informed a staff member that officer Opanasenko did not like him. Plaintiff will provide this officer name when he see the office, because Plaintiff does not know it right off. However, officer Opanasenko, insisted that Plaintiff pick these things up and hand them to the requesting prisoners, and stand around for 15 to 20 minutes waiting on someone to request equipment. This caused a conflict between this officer and Plaintiff. Officer Opanasenko went so far as to fabricate an assignment evaluation form, fraudulently falsified the written statement on the bottom of the work assignment evaluation, alleging that Plaintiff wrote: "I would like to be removed from this detail".

Grievant's Signature

grievance continue on page -1-

RESPONSE (Grievant Interviewed? ☐ Yes ☐ No If No, give explanation. If resolved, explain resolution.)

See Attached Response

Respondent's Signature | Date | Reviewer's Signature | Date

Respondent's Name (Print) | Working Title | Reviewer's Name (Print) | Working Title

Date Returned to Grievant:	If resolved at Step I, Grievant sign here. Resolution must be described above.	Grievant's Signature	Date

DISTRIBUTION: White, Green, Canary, Pink--Process to Step One; Goldenrod--Grievant

First Grievance

Grievance page -1- continue

as that of Plaintiff's writing, although Plaintiff signed the document as required by Classification not to be Doubled Oed, Plaintiff did not write said statement as indicated on evaluation form, officer Opanasenko also involved a Lieutenant in an attempt to have Plaintiff placed in Segregation by writing a Threaten behavior misconduct on Plaintiff, although the misconduct was never written, Plaintiff was interviewed by said Lieutenant stating that when Plaintiff refused to pick up requested equipment that Plaintiff was threatening towards him (officer Opanasenko), although at the time Plaintiff had on a neck brace and walked with a cane. NOTE: the Lieutenant became involved the day after on August 21,2001, (the incident where Plaintiff refused to lift equipment), when officer Opanasenko told him that while Plaintiff was eating morning chow, Plaintiff was marcating him (officer Opanasenko), stating that Plaintiff stare was threatening him.

At the time of the above incident, Plaintiff was wearing a neck brace and walking with a cane, (although Plaintiff still walk with a cane to this date), due to a November 14,2000 automobile accident in which my neck was broken and I suffered spinal cord injuries. Officer Opanasenko, Classification Director, Deputy Warden, Health Care and Warden were all aware of my current conditions.

The work assignment report will cause Plaintiff irreprisable harm if it remains in Plaintiff prison file, for the Michigan Department of Corrections Parole Board score points for inadequate work performance, this will add to a negative probability for parole for this Plaintiff.

[redacted]

Qualified Immunity would not shields officials from Liability for Civil Damages where their conduct was outside the scope of their duties and violated clearly established Statutory or Constitutional Rights of which a reasonable person would have known.

This matter can be partially resolved by the following: 1). a written apology from all parties involved, officer Opanasenko, Health Care, Classification, Deputy Warden and Warden, the apology can come in one letter with the above defendants names and rank on it, 2). removal of "prisoner program and work assignment evaluation" from all Plaintiff's institutional files, 3). that Plaintiff not be placed on double O status, 4). that Plaintiff will not be required to work unless cleared by personal outside doctor's and 5). no "retaliatory actions" towards Plaintiff person for any reason by any of the above named defendants or their agents or co-workers, and finally, 6). that Officer Opanasenko, Health Care (named personnel who cleared Plaintiff for such a job) and Deputy Warden be reprimanded with 7 days off work without pay. Any deviation from the above Voids any agreement between Plaintiff and the defendants.

"Thank You For Your Cooperation"

Lorenzo T. Jones/Johnson
311620[illegible]
9625 Pierce
Freeland, Michigan 48623

BEST AVAILABLE COPY

Grievance Response

Grievance Number SRF-01-09-01068-02a

GRIEVANT INTERVIEW: Grievant states he has was written a work report which is not appropriate. Grievant stated his only issue is that he was written a "bad" work report that is not true. Grievant was angered that this may affect his upcoming Parole Hearing.

INVESTIGATOR SUMMARY : Prisoner was issued a Prisoner Program and Work Assignment Evaluation on 8-21-01. This evaluation was issued appropriately and contained necessary factual information. Officer Opansenko's evaluation of Prisoner was accurate.

FINDINGS: Michigan Department of Correction Policy Directive 01.04.130 states in part, "A prisoner may challenge the accuracy of factual information in documents prepared by the Department which are contained in the prisoner's files but **may not challenge opinions, impressions and judgements contained in such documents and records.**" It is the prisoner's responsibility to present information in support of the challenge. Officer Opansenko's evaluation is considered appropriate. Therefore this grievance is denied.

EXHIBIT-B-

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE APPEAL FORM

4835-4248 12/97
CSJ-247 B

Date Received by Grievance Coordinator at Step II: _____

Grievance Identifier SRF-01-09-01068-02a

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE.
The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) MUST be attached to the white copy of this form if you appeal it at both Step II and Step III.

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: Warden Bock by 10-18-01 If it is not submitted by this date, it will be considered terminated.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Jones, Lorenzo	176204	SRF	12-42[illegible]	8-20-01	10-11-01

STEP II--Reason for Appeal /// In responding to Plaintiff grievance, the respondent Sgt F. Yell, failed to answer Plaintiff issues therein: 1. Plaintiff filed the within grievance on "Health Care, Warden Bock, Deputy Warden of Programs, Classification Director and Openassenko". Although the officer was supervising officer and harassed Plaintiff, the officer was "NOT" the only responsible party therein, Plaintiff was "NOT" medically clear to work such a Job do to his injuries. Therefore making all of the above defendants responsible for placing Plaintiff on such assignment. Where they know, knew or should have known that Plaintiff was physically unable to perform such a duty. Removing the work form is not a cure all in this matter only a step.

STEP II--Response

Date Received by Step II Respondent:

Respondent's Name (Print) | Respondent's Signature | Date

Date Returned to Grievant:

STEP III--Reason for Appeal

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

DISTRIBUTION: White--Central Office; Green - Canary --Step III; Pink--Step II; Goldenrod--Grievant

Response - Step II Grievance Appeal
SRF-01-09-01068-02a
Jones #176204

Grievant claims that Officer Opanansenko fabricated a negative Work Report. As the Parole Board may issue negative points to Grievant for bad work reports, which in turn may lower his probability of parole, he wants this removed from his files.

The Step I Respondent determined that the Grievant was issued a negative Prisoner Program and Work Assignment Evaluation on 8/21/01. Per PD-01.04.130, Grievant may challenge the accuracy of factual information, but may not challenge opinions, impressions and judgements in such documents and records. The Grievant is responsible for presenting information in support of his challenge. The officer's evaluation was appropriate, and the grievance was denied at Step I.

On appeal to Step II, Grievant alleges that the Step I Respondent did not answer the issues presented (i.e. he only addresses the Officer, and did not address the other parties who were grieved). He also alleges that he was not medically clear to work the detail issued, and the grieved parties knew, or should have known, he could not perform those job duties. Grievant has a Special Accommodation Notice in his file authorizing possession of a neck brace and wooden cane. Step I documents include verification from Health Care that Grievant was physically capable of working this assignment. Further, Classification specifically issued Grievant a detail for Equipment Handler as a light-duty assignment, due to his medical condition. Grievant was appropriately given the job detail; Health Care verified that his medical condition does not preclude him from handing out recreation equipment. The other grieved parties, Warden and ADW of Programs, are not licensed medical staff, therefore they must rely on Health Care's evaluation of the Grievant's medical limitations.

A review if the CAJ-363 work evaluation reveals that the reporting Officer signed the form as both Evaluator and Supervisor. *As the reporting officer should not sign the form in both places, the work report will be removed from Grievant's file. However, the reporting Officer may re-do the CAJ-363 and have the supervisor sign it.*

Staff are reminded that all CAJ-363's should be signed by a supervisor prior to processing through Classification.

Grievance is partially resolved at Step II.

Barbara N. Bock

Barbara N. Bock, Warden
Saginaw Correctional Facility
October 30, 2001

cc: Grievance Coordinator - SRF
ADW Chaplin - for action
file

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE APPEAL FORM

4835-4248 1297
CSJ-247 II

Date Received by Grievance Coordinator at Step II: 10/31/01

Grievance Identifier SRF-01-09-01068-02a

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE.
The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) MUST be attached to the white copy of this form if you appeal it at both Step II and Step III.

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: Warden Bock by 10-18-01 if it is not submitted by this date, it will be considered terminated.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Jones, Lorenzo	176204	SRF	12-028	8-20-01	10-11-01

STEP II--Reason for Appeal /// In responding to Plaintiff grievance, the respondent Sgt F. Bell, failed to answer Plaintiff issues therein: 1. Plaintiff filed the within grievance on "Health Care, Warden Bock, Deputy Warden of Programs, Classification Director and Opunasenko". Although the officer was supervising officer and harassed Plaintiff, the officer was "NOT" the only responsible party therein, Plaintiff was "NOT" medically clear to work such a Job do to his injuries. Therefore making all of the above defendants responsible for placing Plaintiff on such assignment. Where they know, knew or should have known that Plaintiff was physically unable to perform such a duty. Removing the work form is not a cure all in this matter only a step.

STEP II--Response

Date Received by Step II Respondent: 10/31/01

See attached response.

B. Bock, Warden - SRF	[signature]	10/30/01	Date Returned to Grievant: 10/31/01
Respondent's Name (Print)	Respondent's Signature	Date	

STEP III--Reason for Appeal /In Warden Bock response to step two grievance, Warden Bock alleged that Health Service had cleared Plaintiff for work or that the Plaintiff injuries does not preclude Plaintiff from said work assignment. That Health Care verified this. Plaintiff contest that the statement by Warden Bock is "FABRICATED" for SRF Health Service has never examined Plaintiff to make a detail of Plaintiff injuries. Next, Warden Bock attempt to side step and over look the issues at bar. According to the Warden interpretation of

CON ON NEXT PAGE-1

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

DISTRIBUTION: White--Central Office; Green - Canary --Step III; Pink--Step II; Goldenrod--Grievant

rec'd 3

AGE-1-CONTINUE

D. 01-04-130, a prisoner may challenge the accuracy of factual information ontained in a CAJ-363 work evaluation form, but may not challenge opinions, mpressions and judgments in such documents.

This interpretation leaves a prisoner who is grieved by a 363 form etween a rock and a hard place, for the information contained in such a report ould always be interpreted as an opinion, impression or judgment.

Although Warden Bock partially granted Plaintiff relief, Warden Bock onetheless give the reporting staff member an opportunity to re-write the nlawful CAJ-363 evaluation form, stating that he just could not sign the orm in both places. No doubt, the reporting staff will write the exact same valuation, leaving Plaintiff with no redress.

Plaintiff contest that the information and 363 form should not be re-lone for Plaintiff, for it was the fruit of unreasonable practice by the epartment of Corrections and it's agents, which violated Plaintiff right o be free of activities that Plaintiff may or may not be physically capable f performing, the first, eighth and fourteen Amendments protests Plaintiff rom such practice and harm, and mental and physical damages have been awarded y Courts for such actions.

Next, Warden Bock claimed that "Warden and ADW" are not licensed medical taff, therefore they must rely on Health Care of Grievant's medical limitations and therefore making neither the Warden or ADW Chaplin not esponsible, however, Warden Bock failed to realize, that she is the Warden f the institution in which Plaintiff currently reside and Chaplin is the ssistant Deputy Warden, thereby making their failure to "ACT" to a wrong ithin their control, make them just as responsible, as if directly causing he harm. For each defendant failed to act or rectify the situation.

FURTHER, Warden Bock failed to address the claim that Defendant panasenko fraudulently wrote a paragraph at the bottom of the evaluation AJ-363 form, alleging that Plaintiff himself had written the paragraph. laintiff content, that he did not write the paragraph on the CAJ-363 form that the paragraph was forged and the writer of the paragraph should be reprimanded, for it is a violation of the Michigan Department of Correction ode of ethics and should not be tolerate by those whom have sworn to up-hold the Laws and Constitutions.

In this case, the stipulation within the grievance has not been resolved s required. In order to resolve this matter, the following conditions must be met: 1). complete removal of the 363 form from all of Plaintiff's prisons files, 2). that plaintiff not be required to work unless cleared by Plaintiff's personal Doctors, Doctor's Mark Jones and Doctor Van der Harst, both are treating physician's of Plaintiff, 3). that officer Opanasenko, Health Care and Deputy Warden Chaplin be reprimanded with a minimum of 7 days "WITHOUT PAY" for their unlawful actions and 4). that no retaliatory actions be taken against Plaintiff by the above named defendants or their co-workers. Any deviation from the above VOIDS any agreement between Plaintiff and the defendants.

ated: November 2,2001

Respectfully

Mr. Lorenzo L. Jones/Johnson #176204

THIRD STEP GRIEVANCE RESPONSE

Lorenzo Jones, #176204
SRF-01-09-1068-02a

The Grievant presents an issue which alleges that he was written a bad work report that was not true. As his relief, he requested that it be removed from his file. The grievance was processed at the local level according to the provisions of Policy Directive 03.02.130 (Prisoner/Parolee Grievances) and Operating Procedure 03.02.130 (Prisoner/Parolee Grievances).

This investigator has reviewed the documents presented with the appeal to Step Three. All relevant information was considered. Based on this review, this writer finds the responses provided at Step One and Step Two adequately address the merits of the main issue grieved. The facility informed this investigator that the work report had been rewritten, the old one was removed from his file and the new one was added. This grievance is resolved.

Approval Signature: Michael A. Farrell Date: DEC 11 2001
#6/12-4/02a

02cv7436
A-[illegible]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Lorenzo L. Jones,
Plaintiff,

V

Civil Case No. 02-74336-DT

Honorable: Victoria A. Roberts

Magistrate: Steven D. Pepe

STATE OF MICHIGAN et, al.
Defendant,

Lorenzo L. Jones #176204 Plaintiff In Pro.se Ryan Correctional Facility 17600 Ryan Road Detroit, Michigan 48212	Christine M. Campbell P31138 Attorney For Defendants Attorney General Office Corrections Division P.O. Box 30217 Lansing, Michigan 48909

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

AFFIDAVIT IN SUPPORT OF SUPPLEMENTAL RESPONSE

I, Lorenzo L. Jones/Johnson, being duly sworn, depose and states that:

1. Plaintiff exhausted all administrative remedies in compliance with PLRA 42 U.S.C. § 1997(e)(a).

2. Plaintiff have attached a true copy of the exhausted administrative remedies.

3. The pleadings asserted in the Plaintiff's Supplemental Response is true and accurate.

4. Plaintiff submitted step I, step II and step III grievance to the appropriate prison personnel, and those persons responded to each step.

5. The attached Exhibits represent a true copy of the Exhausted Administrative remedies.

Subscribed to and sworn before me
on this 27th day of March 2003.

[illegible]
Notary Public, Wayne County, MI
My Commission Expires Aug 14, 2004